In The Supreme Court

Appeal from the Court of Appeals
Presiding Judge, Jessica R. Cooper

ANTONIO CRAIG, minor, by his
Next Friend, Co-Conservator and Mother,
KIMBERLY CRAIG,

Plaintiff-Appellee,

Docket No. 121407-09

vs.

COA Case No.: 206642, 206859, 206951

OAKWOOD HOSPITAL,
a Michigan Corporation,
HENRY FORD HOSPITAL,
d/b/a HENRY FORD HEALTH
SYSTEM, a Michigan Corporation,

Wayne County Circuit Court
Case No.: 94-410338 NH
Hon. Carole F. Youngblood

Defendants,
and

ASSOCIATED PHYSICIANS, P.C., and
ELIAS G. GENNAOUI, M.D.,

Defendants-Appellants

BRIEF ON APPEAL - BY PLAINTIFF-APPELLEE IN RESPONSE TO APPELLANTS ELIAS G. GENNAOUI, M.D. AND ASSOCIATED PHYSICIANS, P.C.

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OBJECTING TO JURISDICTION

There is NO jurisdictional summary in Dr. Gennaoui and Associated Physicians, P.C.'s Brief which appears to be a per se violation of jurisdictional form requirements under MCR 7.212(4). MCR 7.306(A) indicates that Briefs must be prepared in the form provided in MCR 7.212(B) and produced as provided in MCR 7.309. Therefore, appellee objects as to Dr. Gennaoui and Associated Physicians, P.C.'s Brief and moves to strike it as well as their appeal.

STATEMENT OF QUESTIONS PRESENTED

I. Whether Plaintiff's witness' testimony was based on facts not in evidence?

The trial court answered: No.

The Court of Appeals answered: No.

Plaintiff-Appellee answers: No.

Dr. Gennaoui and Associated Physicians answer: Yes.

II. Whether the trial court and the Court of Appeals erred in permitting the testimony of Plaintiff's expert witnesses?

The trial court answered: No.

The Court of Appeals answered: No.

Plaintiff-Appellee answers: No.

Dr. Gennaoui and Associated Physicians answer: Yes.

I. INTRODUCTION

Although already covered in detail in plaintiff-appellee's responsive Brief with respect to appellant Oakwood, and Appellants Gennaoui and Associated Physicians never raised any Davis Frye issue prior to verdict, this Brief will again address the two limited issues identified in this Court's September 12, 2003 Order [1a].

At no time before or during trial did Gennaoui or Associated Physicians ever request a Davis-Frye hearing. This issue is simply not preserved at this point. Facts surrounding the issue of permitting the testimony of plaintiff's expert witnesses was expressed in the first Argument section of plaintiff-appellee's Brief in response to appellant Oakwood. It is reiterated that Oakwood omitted from its Brief or Appendix a copy of its actual Motion In Limine To Exclude Testimony From Ronald Gabriel, M.D. which was and is in plaintiff's Appendix. [1b-5b]. In short, Oakwood's lower court Motion In Limine asked the court to entirely exclude Ronald Gabriel's testimony. It raised qualifications as an issue and was a broad motion to exclude all testimony from Dr. Gabriel. The Oakwood lower court Motion failed to identify or specify where in the deposition transcript they felt his causation testimony departed from accepted or reliable science. Oakwood attached the entire transcript of Dr. Gabriel's deposition to their Motion In Limine and only asked for a Davis Frye hearing as an alternative remedy calling his testimony. The written motion contained only the attorney's broad allegations and complaints about unfounded testimony by Dr. Gabriel and did not include any specifically identified theory or method, and didn't include any medical citations or affidavits. Plaintiff filed a written Response to the Motion [6b-10b] which included several mainstream literature references in support.

At the motion hearing, Oakwood specifically identified the motion as theirs ("my motion"[33a, line 18]) and set forth on the record that they specifically disputed "whether the use of oxytocin (Pitocin) can cause a traumatic head injury against mother's anatomy." [41a, lines 21-25] As will be seen, this alleged dispute over the assertion that Pitocin can cause a closed head injury or traumatic fetal head injury against mother's anatomy was soon abandoned by Oakwood, and was and is a waste of time. By reading the defense experts' and defendants' trial

testimony, it will become clear that the unanimous consensus in all of medicine, of even the most hostile of defense expert witnesses at trial, is that Pitocin can and does cause closed head injuries against mother's anatomy, which makes it not novel and which made the (subsequently abandoned) motion entirely moot and specious in its conception. Its resurrection on appeal, is just another appellant fiction.

Importantly, at their lower court pre-trial motion hearing, Oakwood's counsel stated on the record that he had not even read Plaintiff's Response to the Motion! [45a, lines 2-4] The Plaintiff's lower court written Response to the Motion cited and quoted from well known literature in support, such as the PDR and the AMA, and established that there was no legitimate dispute and that there was no novel theory. Importantly, the lower court held the hearing, and following discussion with Oakwood's counsel on the record, granted his request to file additional pleadings on the Davis-Frye issue [44a-45a] months before trial. She explained that she was only providing her ruling "today" on Oakwood's Motion To Exclude Testimony From Ronald Gabriel, M.D. [45a, line 7-8] No Order was ever proposed or entered in the lower court denying a Davis-Frye hearing. This is because Oakwood abandoned the entire closed head injury theory general challenge, never objected to the theory again during pretrial or during trial, never filed the requested additional pleadings, never raised the issue again. Oakwood chose to not file additional pleadings, to not present oral argument further, and instead to abandon this specious issue.

The facts in evidence for malpractice, causation and injury are overwhelmingly convincing. In terms of the facts in evidence issue, it is uncontested that plaintiff's mother received six and one half hours (6 and ½ hours) of non-stop intravenous Pitocin (oxytocin) administration. Plaintiff's expert obstetrician Dr. Paul Gatewood provided a detailed reading of the medical records that revealed excessive and inappropriate Pitocin administration and testified to the deviations from the standard of care. [140b-155b, 48a (contraction coupling, not full relaxation between contraction reducing blood flow to the baby resulting in decreased oxygen), 49a-50a, 156b-159b, 160b, 162b-164b, 170b, 173b -179b, 186b-200b, 54a-55a]

It is uncontested that the drug oxytocin, in this case under the trade name Pitocin, inter alia, stimulates and enhances uterine smooth muscle contractions, and has well known and universally established potential fetal complications arising therefrom. The potential fetal complications include both trauma and ischemia-hypoxia. Plaintiff's obstetrical expert Paul Gatewood, M.D. described the hypoxic-ischemic complications of inappropriate and excessive use of Pitocin on the uterus and the blood supply to the fetus as follows: "Whenever Pitocin is used, and the uterus contracts with or without Pitocin, what happens is the blood supply coming to the placenta from the uterus is shut down and if it's overstimulated it shuts off...that shuts down the blood...where it's hyper-stimulated, it over contracts or contracts too long without adequate resting between contractions, then you have a period of time where you're not getting any oxygen to the placenta and, therefore, out to the baby." [138b] (See Footnote 10, infra)

At 207b-208b, Plaintiff's expert pediatric neurologist Dr. Ronald Gabriel clearly and carefully explained three (3) mechanisms of brain injury, including trauma and hypoxia-ischemia under the influence of Pitocin, including "less blood flow from the placenta," exactly as explained by Dr. Gatewood. Dr. Gabriel stated that the contractions in this case caused injury to the fetal brain as follows through the following mechanisms:

(1) "Direct pressure...producing excessive pressure on the skull and that produces direct trauma;"
(2) "Elevations in venous pressure in the fetal head and cause lack of blood flow to the fetal brain;" and
(3) "Clamp down the uterus, reducing blood flow of the maternal system to the placenta so that the fetus gets less blood flow from the placenta, producing reduced flow to the fetal brain." [206b-207b]

The fetal-uterine monitoring records are medical records that immediately after birth were noted in the record by the nurse to have been "sent to [the] Medical Records" department and, hence, made part of the medical record at Oakwood Hospital itself. [18b] The fetal-uterine monitoring records, as a powerfully probative evidentiary medical record, also made it uncontested that there were hours of fetal heart rate decelerations with contractions after the Pitocin was started. [23b-88b] It was also NOT contested by either of the obstetrical

defendants that these decelerations were indicative of head compression and fetal blood supply compression, and were sometimes referred to as either "early" or "variable" decelerations. The decelerations worsened over the hours, eventually reaching a hopeless crescendo of repeatedly severe decelerations which lasted over 30 minutes. These fetal-uterine monitoring records are facts in evidence which made it clear that the Pitocin administered to Ms. Craig caused repeated bouts of fetal head compression and reduced fetal blood supply, and caused there to be non-relaxed prolonged uterine pressures and abnormal contractions exerting direct pressure on the uterine contents which included the fetal blood supply and the fetal head.

Admissions and other supportive testimony from both defendant Kittur and defendant Gennaoui are summarized, infra. The mechanisms involving both head compression and the reduction of blood flow to the fetus were provided by both plaintiff's obstetrical expert Paul Gatewood, M.D., and plaintiff's pediatric neurology expert Ronald Gabriel, M.D. The diminished blood flow to the fetus mechanism testimony was based upon reading the actual fetal-uterine monitoring recordings and other hospital records, and was testified to by both plaintiff's experts. Paul Gatewood, M.D. stated [186b,lines 4-22]: "Each time that happened that reduced blood supply to the baby. Because of, number one, the contraction causes reduced blood supply to the placenta as we discussed from the vessels. And secondly, the blood helps supply and it was going as oxygenated blood supply that was coming from the, it was compromised because of the cord being depressed. So those together resulted in decreased oxygen, so that's what we call hypoxia. And that's one of the major things as an obstetrician we endeavor not to have happen. And as a result of the hypoxia as an obstetrician we know that this has an apparent or abnormal or deleterious effect on babies particularly in the nervous system. " Further, Dr. Gatewood testified [192b,54a-55a] to the proximate causes of the "reduced blood flow...reduced oxygen"; he also noted [200b]: "When the uterus clamps down the blood flow to the fetus is reduced". Plaintiff's pediatric neurology expert Ronald Gabriel, M.D. sometimes referred to reduced blood flow as ischemia or reduced "profusion." He noted [85a, lines 8-10] that there was "No *global* hypoxia-ischemia" but continued that there *was* "localized ischemia in

the watershed regions because of reduced profusion;" and [208b, lines 10-13], "Pitocin will clamp down the uterus reducing blood flow of the maternal system to the placenta so that the fetus gets less blood flow from the placenta producing reduced flow to the fetal brain;" and [215b-216b], "the vascular component, that is to say the reduced blood flow;" and [245b, lines 9-11], Not the absence of oxygen, "but the reduction of blood flow which leads to reduction in oxygenation of the tissues."

The fact that reduced blood flow to the fetus from the cord or placenta causes reduced oxygen to the fetus is self evident since a fetus acquires oxygen from the mother's blood, and not by breathing, but was also provided in testimony by both experts Dr. Ronald Gabriel [93a,244b-245b, lines 25,1: "Reduced blood flow and because the blood flow is reduced that reduced oxygen in delivery;"] [245b lines 6-11: the damage is caused by "...the reduction of blood flow which leads to reduction in oxygenation of the tissues"] [245b,lines 19-22: explains a study which used Pitocin to reduce blood flow, focused on and induced "ischemia," not trauma, to cause cerebral palsy in fetal animals] and by Dr. Paul Gatewood who sometimes referred to it as "hypoxia." [192b,54a-55a: testified to the proximate causes of the "reduced blood flow...reduced oxygen"]; [188b-192b, 54a, 198b including remarking on the fetal-uterine monitoring recording of severe repeated decelerations and stating that: "Ischemia, means lack of oxygen.", 54a, line 5] Hence, both Drs. Gatewood and Gabriel found "ischemia" in this case resulting in lack of oxygen - the SAME mechanism.

Additionally, as a separate but Pitocin-related mechanism of injury, defendant-appellant Dr. Gennaoui

[(Gennaoui) 277b-278b: Oxygen was administered, Pitocin was stopped, because of the presence of early decelerations; 279b: "Early decelerations have to do with head compression"]; [(Gabriel)238b, lines 20-21: "these decelerations to me indicate head compression as well as compromising profusion"]; [(Gabriel) 206b, line 22: "compression trauma"]; [(Gabriel) 245bb: "trauma plus diminished blood flow"]; [1],[2],[3]; [(Ziegelman) 317b, lines 6-7: "as the head comes down and gets compressed, so it's manipulation of the fetal head;" lines 9-13: "variable decelerations can be caused by fetal head compression"; 318b, lines 6-12: "head pressure can cause variable decelerations" and at 317b, lines 10-11, line 18: Dr. Ziegelman admitted that he saw "significant" and "severe" variable decelerations; and at 318b Dr. Zielgelman admitted that fetal-uterine monitoring recording panels 904, 905, 906, 907 and 908 all display "severe variable decelerations."]

Anatomically, Dr. Gatewood referred to the fetal head "coming through the boney pelvis." [178b] Dr. Gabriel used a similar term, "the pelvic outlet "[96a, lines 6-15] , which he described as the maternal "boney frame" through which the uterine contractions moved the fetus, head first. [4] [98a, 249b]

The brain injury testimony from a plaintiff's witness was based entirely on facts in evidence through testimony provided by Dr. Gabriel. [202b, 204b-205b, 218b–222b, 225b, 228b-232b, 235b-237b, 77a-82a, 85a,

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[1] Even Dr. Humberto Bernal, M.D., who was a third year obstetrical resident at the time of plaintiff's labor, testified that decelerations indicated head compression [284b] and that if the mother had hypertonus or prolonged contractions, there would be decelerations [282b]; Further, defendant Dr. Gennaoui admitted that the early deceleration was "something significant for head compression" and that they are "caused by head compression." [252b, 279b]

[2] Defense expert Steven Donn, M.D., director of Neonatology at U. of M., corroborated the "two potential mechanisms through which injury may come about" which he stated as "trauma and hypoxia" and further explained as "trauma from excessive contractions of the uterus. There may be hypoxia by having a decreased amount of blood flowing to the fetus." [366b]

[3] Given the aforementioned quotes and citations, Oakwood's Brief, at p. 14, line (3)(a) engages in rank misrepresentation to this Court by saying that Dr. Gabriel testified to: "fetal head trauma and not hypoxia."

[4] Dr. Gabriel corrected defense counsel and insisted on calling it the "Pelvic outlet." (96a, lines 6-15). The boney pelvis/outlet through which the fetal head must go is basic human anatomy.

241b-245b, 96a, 98a, 246b-250b]

Oakwood, and now appellants Dr. Gennaoui and Associated Physicians, have omitted huge portions of the facts in evidence at trial, as well as testimony, in order to create a completely false impression. The recorded newborn examination performed by the observation nurse was not normal and the elevated respiratory rate (tachypnea) of 64 was recorded to have continued unchanged, heart rate was high at 160, molding of the newborn head was noted, skin was "black," and the newborn hospital photograph shows a broad swelling across the forehead, bruising on the right side of the head, right sided edema, extreme eye deviation to the right, and a left sided cortical thumb, all of which are not normal, and for some reason, as was agreed by defendants, no physician examined this baby until the third day of his life, and even this solitary recorded exam was cursory.

EEG [89b-90b] performed at Children's Hospital of Michigan in Detroit on 10-29-81 was stated to be abnormal and displayed a "MAXIMAL RIGHT FRONTAL" process "mainly involving the right frontal area" of the brain in addition to a diffuse disturbance of cerebral function. This precisely substantiates Dr. Gabriel's testimony and corresponds to the newborn hospital photograph. The EEG report referred specifically to "a focal irritative process mainly involving the right frontal area." The note by Dr. Nigro [90b] clearly stated that at that time the "left side more involved." The left side of the body is supplied by the right side of the brain. An EEG performed at Henry Ford Hospital on 3-19-90 [91b-92b] again revealed an irritative disturbance focally over the frontal regions, "more so on the right."

Antonio was seen and followed by the University of Michigan's Department of Physical Medicine and Rehabilitation. At evaluation on 7-28-94, he was identified by Virginia Nelson, M.D. as being "a 14 year old boy with spastic and athetoid cerebral palsy." [93b-94b] It was noted on examination that all four limbs are effected (Quadriplegia) and that he "tends to hold his elbows flexed with his hands fisted." This abnormal finding of fisting is interesting and probative since a cortical thumb was present on his newborn hospital photograph.

Virginia S. Nelson, M.D., then Chief of the Pediatric and Adolescent Rehabilitation Service at the

University of Michigan, testified at trial via video as to Antonio's diagnosis of "cerebral palsy" [135b, line 9]. Dr. Nelson is an expert on Cerebral Palsy and described cerebral palsy as indicative of a brain damaging event: "a **nonprogressive lesion of the brain**" which is "**not changing. It happens, it's done, and it leaves whatever effects it leaves.**" [134b]

Like an Ostrich who has placed its head in the sand in hopes of avoiding being seen, similar to the strategy utilized in Oakwood's Brief filed before it, appellants' Brief completely omits any medical records. It doesn't even attempt to take on the appearance of propriety or intellectual honesty. All medical records, including the following critical records, all admitted into evidence without objection, all providing support for plaintiff's case, all "facts in evidence," were omitted and ignored by the appellant:

(1) The continuous fetal-uterine monitoring recordings [23b - 88b]
(2) Continuation of the Nursing Notes [18b]
(3) Post-delivery 7:45 p.m. newborn nursing examination-note in the Observation Nursery's Nursing Notes [19b]
(4) The Newborn Hospital Photograph [20b]
(5) Brain MRI consultation from University of Michigan Dept. Of Radiology [371b]
(6) EEG reports from Children's Hospital of Michigan (CHOM) and Henry Ford Hospitals revealing focal damage worst over right frontal lobe. [89b-92b]

Relevant portions of testimony were also excluded. As will become clear to this Court, once all of the actual facts in evidence are reviewed, there will be no legitimate issue of law remaining here beyond the appellants' false depiction of this case and this mother's injurious labor and this child's tragic nativity.

II. COUNTER-STATEMENT OF FACTS

Ms. Craig was a full term pregnant woman whose membranes had spontaneously ruptured with clear fluid at 5:30 a.m [23b] on July 16, 1980 and she, along with the infant's father, immediately came to defendant Oakwood Hospital's labor and delivery for admission.

Initially, attending obstetrician Dr. Kittur undertook care. Dr. Kittur wrote an order for an external monitor. Dr. Kittur also wrote an order to start a "K.O."(keep open) I.V. of Ringers Lactate ("RL") [87a], which was attached

to the patient as noted at10:00 a.m.[17b][15b].

A fetal-uterine monitor was attached at 9:30 a.m. [17b] Two hours before being "augmented" with Pitocin (oxytocin), the fetal-uterine monitor recordings [23b-88b] revealed that Ms. Craig was in early labor, with obvious spontaneous uterine contractions. A pattern of uterine contractions was nicely displayed beginning with a prominent contraction at the first page, panel 39353-39354 [23b], and continuing on to three separate contractions shown on 24b between panels 39354-39357. Panel numbers on the monitor recordings are four minutes apart. According to defense obstetrical experts and defendant Gennaoui's labor and delivery dictation [14b "contractions were felt"] and plaintiff's expert witness all examining the same records, including the fetal-uterine monitoring records, Ms. Craig was indeed in labor on admission (Dombrowski, 292b, lines 11-15 "she was in labor on admission.") (Gatewood, 157b-158b) (Ziegelman, "early labor," 305b, lines 15-16). Dr. Dombrowski even acknowledged this fact by testifying that the Pitocin use in this case was probably an augmentation of pre-existing labor; in noting that she was probably in labor, he was disagreeing with the attending physician's assessment, because "her attending physician obviously thought she wasn't" in labor. (Dombrowski, 293b, lines 8-13)

At 10:00 a.m. an erroneous conclusion was reached. A nurse made and noted the erroneous conclusion in the Nurses Notes that there were No Contractions: "Contr None" [17b] A Delivery Record also memorialized the same erroneous conclusion by stating that "Onset of Labor" was "noon."

After this erroneous conclusion of no contractions, Defendant attending obstetrician Dr. Gennaoui took over Ms. Craig's care and ordered that Pitocin be started. [15b] Given the fact that Ms. Craig was already in labor, the Pitocin "augmented" labor, and, given the fact that there is no recorded examination of Ms. Craig from 8:45 a.m. until 2:30 p.m., there is certainly no recorded examination providing a clinical indication for augmentation with Pitocin.[5]

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[5]The dictated delivery note by Dr. Gennaoui states that "pelvic findings were the same" at 11:30 a.m. when the Pitocin was started [14b] but the place where the vaginal exams are noted didn't show it and the fetal-

Pitocin is a clear liquid that comes in a bottle and must be withdrawn by needle, by a nurse, following a physician's order, and added by injection into an IV bag containing clear fluid, to make the Pitocin infusion mixture. There was one order for Pitocin in the record. Let's repeat that fact in evidence. There is and was only ONE order for Pitocin in the entire record. Pitocin was ordered by Dr. Gennaoui to be placed in an I.V. of "L.R." (Lactated Ringers) [15b]. The Pitocin was started at 11:35 a.m. [11b-12b] A rate for this infusion was not stated in Dr. Gennaoui's order or any other order. The Pitocin dosage rate was recorded as increased by the nursing staff, by increments of 2 milli-units per minute, from 2 milli-units at 11:35 a.m., up to 18 milli-units per minute by 3:25 p.m. where it remained until being emergently shut off at 6:00 p.m. [11b] Hence Pitocin was given for a whopping 6 and ½ continuous hours.

All agree that despite only one order, two separate IV solutions were given simultaneously to the patient. On appeal, appellants Oakwood and Gennaoui et al submitted conflicting Briefs. In their separate Briefs, each separately claimed that a different nurse administered Pitocin, in a different type of IV solution. Taken together, the Briefs admit that two different nurses administered Pitocin in different IV solutions to this patient. Hence, plaintiff's case is established by a careful reading of BOTH appellants' Briefs. Oakwood's Brief admitted that "Nurse Tyra used ... D5W when she mixed the Pitocin and administered it to Ms. Craig through the IVAC (Oakwood's Brief, p. 30, footnote 24)." The Gennaoui et al Brief, at page 8, admits that Nurse Quinlan, a different nurse, administered Pitocin and placed it in a Five Percent Dextrose and Lactated Ringers IV (D5LR). Gennaoui et al at page 8 admit as follows: "the medical records indicated that Nurse Quinlan hung the Pitocin...to be placed in the D5 Lactated Ringer solution." Whoops. Both are correct, based on the records in evidence.

Everyone agrees that the IV piggy-back set-up occurred. Everyone agrees that there were two IV bags, each containing Pitocin, each placed there by different nurses. For illustration, an example of a piggy-back type

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uterine monitor recordings didn't note it or reveal it either.

of IV set-up can be seen in a demonstrative figure from an IVAC machine's accompanying literature attached as 368b-369b.

It is uncontested that there was no order for D5W (5%D/W) solution, there was no order for Pitocin to be placed in a "D5W" solution, and no order for an I.V. piggy back ("IVPB") set-up or a two solution set-up at all. There is more than one entry in the medical record that proves that Pitocin was not only placed in D5W, but was also placed into the lactated ringers (RL) solution. The facts of how this occurred will be presented in a sequence of five (5) steps, as they were succinctly demonstrated for the jury at trial.

(1) The first of four (4) important Pitocin pages is 15b, which represents the physician's orders. Dr. Kittur wrote the order for a K.O. (keep open) RL (Ringers Lactate) I.V. 15b shows that nurse J. Tyra signed off the order for 1000cc of RL (Ringers Lactate). Nurse Tyra also noted the act of establishing the Ringers Lactate (RL) I.V. in the right hand in the nursing notes on 17b. Her act was step one (1). It is uncontested that Dr. Gennaoui took over later that morning, and that he wrote an order for 10 units (**one amp**) of Pitocin to be placed in 1000cc of the **D5LR**. (Lactated Ringers or Ringers Lactate). [15b] His act was step two (2).

Importantly, the Pitocin order is signed off by a different nurse, a second nurse, who was nurse K. Quinlan, and nurse Quinlan's signature indicated that she placed Pitocin into the liter bag of lactated ringers (LR). [15b, 16b] Her act was step three (3) It is apparently Oakwood's argument now that this event never happened. Oakwood is still desperately arguing that nurse K. Quinlan never placed Pitocin into the LR - even though the order was written for it, and even though she signed off on the order with her unmistakably prominent signature. [16b]

According to the defense's own nursing testimony, that of Oakwood nurse Rhea Hill, R.N., by signing off the order, nurse Quinlan would have been the person completing the order as written and placing the Pitocin into the D5LR. [302b] Nurse Hill, whose writing appears in two early morning notes on 302b, stated at trial that "you

would expect the person that did the task or followed the order. " [302b] This confirmed further that the signature of nurse K. Quinlan, R.N. indicated compliance with the order and was more than substantial evidence that nurse K. Quinlan would have personally placed the Pitocin into the ordered LR.

17b contains a nursing note, written by nurse Tyra (or spelled ?Gyra), which indicates that nurse Tyra created a second Pitocin infusion which was mixed in a "D5W" solution. Her act was Step four (4). This was a type of IV Pitocin solution not ordered. By omitting all medical records, and omitting any mention of this in his Brief, Appellant Gennaoui is now apparently arguing this never happened.

17b also indicates that nurse Tyra then took the D5W Pitocin solution and created a piggy-back arrangement with the existing lactated ringers (RL) solution, for which there is no order, using the 1000cc **of "D5W"** with one amp of Pitocin added. The creation of a piggy-back arrangement by nurse Tyra was Step five (5) - the nightmare which is contained right in the Oakwood medical records. IV tubing has a number of portals for infusions, and a piggy-back arrangement is created when a first IV is connected so it infuses into a second IV tubing which is flowing into the patient. Piggy-back set-ups are utilized in medicine a lot. [369b]

Hence, nurse Tyra connected the second bag containing Pitocin, this one in D5W, to an I.V. set-up of LR that already had Pitocin. The facts in evidence, a plain reading of the medical records, thus proved that there were two nurses each placing Pitocin into two different bags connected to each other and flowing into the patient simultaneously - a 2 bag set-up called an intravenous "piggy-back" set-up or "IVPB." Nurse Tyra took the un-ordered D5W Pitocin solution and created this documented "IVPB" type of arrangement, which means it was piggy backed or injected into the other pre-existing IV. Again, Oakwood admits that this IVPB two bag arrangement took place, which was not ordered. Defendant Gennaoui acknowledged at trial that nurse Tyra made a mistake. [255b] [6]

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[6] The defendant Oakwood Hospital came up with a desperate notion that the nurses would each have manually placed a brightly colored sticker on the I.V. bags denoting it as having Pitocin. For example, they had

At the bottom of 4b, there is a note that documents that at about 7:45 p.m., Ms. Craig arrived in the Recovery Room with an I.V. of "D5RL" (Ringers Lactate) containing "two ampules of Pitocin infusing well right hand with 200 cc remaining." Defense expert obstetrician Seymour Ziegelman, M.D. testified and explained this as meaning that 800 cc's of this solution "had gone into the patient over nine hours" [306b, lines 13-14; 307b, lines 10-13] It is uncontested that there is no Order for two Ampules of Pitocin but, more importantly, this Recovery Room record provides additional "facts in evidence" that there was Pitocin in the lactated ringers (LR) I.V. that was infusing into the patient's right hand, and therefore again corroborates the presence of Pitocin in the lactated ringers (RL) I.V.

Defense obstetrical witness Seymour Ziegelman, M.D. also testified that use of Pitocin in this case was for the "augmentation" of labor, and he testified that with augmentation, you are supposed to use "less Pitocin" 308b, lines 5-7; he further testified that if labor is progressing, albeit slowly, oxytocin should not be used [309b, line 19]. Further, as labor progresses, the dosage required of Pitocin often decreases, according to Dr. Ziegelman. [310b, lines 19-21] Yet, the dosage of Pitocin was never lowered in this case until it had to be shut off emergently, too late, at 6 p.m. [11b] - after six and one half (6 ½) total continuous hours of Pitocin and after two hours and 35 minutes of 18 milliunits per minute at the highest dose! [7]

Contractions were listed by nurses as "mod" meaning moderate and "q2" or "q3" or "q4" meaning every 2 or 3 or 4 minutes, yet the Pitocin was increased again after those notes at 12:50 p.m., 1:20 p.m., at 1:40, at 2:30 p.m., at 2:55 p.m. and at 3:25 p.m. [11b] Even defendant Dr. Kittur testified and admitted that if and when there

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former obstetrics third year resident (in 1980) Humberto Bernal, M.D. testify that "they *usually* have a label." Vol. 16, page 28, line 22.

[7] "One characteristic of intravenous oxytocin is that when successful, it usually acts promptly, leading to noticeable progress with little delay. Therefore, the drug need not be used for an indefinite period of time to stimulate labor. **It should be employed for no more than a few hours...**" *Williams Obstetrics*, 20th Edition, page 428 (1997)[emphasis added].

are moderate contractions every 2 to 3 minutes, it would have been a deviation from the standard of care in 1980 to further increase the Pitocin infusion rate. [346b, at 181-182, lines 20-25, 1-3]

An internal fetal monitor was placed at 2:30 p.m., and thereafter hours of continuous fetal heart/uterine pressure monitoring recording strips exist as facts in evidence, and were read by defense and plaintiff witnesses, including the defendants, as displaying marked abnormalities including uterine hyper-stimulation, fetal head compression and blood supply compression coinciding with the uterine contractions.

Viewing the monitor strips, Defendant Gennaoui admitted that an early deceleration is significant for fetal head compression [251b] and that early decelerations took place in this case and that the Pitocin was finally shut off because of "persistence" of the decelerations. [276b-277b] He identified early and variable decelerations [256b] and admitted that variable decelerations "are an objective sign of cord compression." [256b, lines 21-23] He admitted that the uterine contraction/fetal heart monitor recordings *would* indeed indicate whether the fetus was not tolerating contractions that were either "too strong or last too long" by indicating that "the heartbeat would slow down" and he admitted that the monitor recordings consistently displayed this pattern during this mother's labor [252b, 252.1b] Dr. Gennaoui admitted that during the administration of Pitocin, continuous monitoring of fetal heart rate and uterine contractions was mandatory in 1980 [258b-259b] and represented the standard of care in 1980, and then he admitted that there was "no monitoring from 1:10 p.m. to 2:00 p.m." while Pitocin was being given in this case. [259b-260b]

A documented attempted fetal resuscitation took place with high volume oxygen by mask at or about six o'clock p.m. The medical record reveals and Dr. Gennaoui admitted that seven (7) liters per minute of Oxygen by mask were administered to the mother[18b, 277b-278b]] because of the presence of repeated early decelerations ["persistent decelerations" 277b-278b], a type of deceleration he had already testified to as significant for fetal head compression. [251b] Dr. Gennaoui also admitted to the existence of repeated severe variable decelerations of the fetal heart rate[109b] [273b] with every uterine contraction in panels 904, 905 and 906 of the

fetal heart/uterine contraction monitor recordings, [85b, 86b, 87b] which to Dr. Gennaoui indicated "the decrease of oxygen to the fetus." [273b] Dr. Gennaoui admitted that severe variable decelerations were "significant to fetal well being...because by definition variable deceleration is related to cord compression and the more severe the decelerations, that means the more cord compression is existing." [272b, lines 17-24]

The dictated delivery note [14b] was misleading in that it curtly stated that "an early deceleration was noticed and Pitocin was discontinued" as if to imply the existence of only one deceleration. The records show that Pitocin was stopped at about 6:00 p.m. [11b], which was at or about Panel 98902, and yet, the patient's fetal-uterine monitoring records, which are facts in evidence, make it clear that the repeated decelerations began, according to, for example, testimony from defendant Dr. Kittur, at least as early as panel 98853 which was about 2:44 p.m., since panel 98849.5 is 2:30 p.m. when the internal monitor is shown to have been exactly placed, and according to, for example, defendant Dr. Gennaoui, repeated decelerations began at least as early as panel 98880, which was 4:32 p.m., growing in severity until bottoming out to 30 beats per minute at 98900, which was at about 5:52 p.m. - still 8 full minutes before the Pitocin was stopped! [Kittur 349b-359b] [Gennaoui 105b,110b-131b, 106b]

To see a modern American city teaching hospital where the people responsible for an obstetrical patient and fetus somehow failed to notice or react to ominous and obvious repeated and worsening decelerations over the course of hours, decelerations which were eventually occurring with each contraction, is chilling. But it happened. It's right there in the Oakwood hospital records - though the appellants would prefer you not look at them or know about them.

The appellants not only completely omitted from their Brief and Appendix the fetal-uterine monitor strips [23b-88b], and completely omitted the continuing nurse's notes on the labor [18b], but also completely omitted significant post-delivery facts in evidence including the observation nursery's initial nursing examination of the newborn, [18b] newborn hospital photograph, [20b], early life EEG's [89b-92b], and University of Michigan's brain

MRI consultation report. [371b] The initial nursing newborn examination [19b] documented tachycardia (HR 160), tachypnea (RR of 64 is abnormal), "black" skin which later became "clear" [22b], a "large umbilical cord," and, importantly, the presence of "molding" of the head. [19b]

Molding, according to defense obstetrical expert Dr. Dombrowski, is indicative of the baby being "traumatized coming through the birth canal." [299b] [300b,line 2, 9-12)] The photograph [20b] was examined at trial by neonatologist defense expert Dr. Donn, who testified that it did reveal a forehead molding pattern, and that the "whole forehead is molded starting above the eyebrows." [363b, lines 14-16, 17-18] Dr. Donn stated that the forehead molding pattern was caused by the birth canal on the head as it passed through. [363b, lines 21-22] Dr. Donn described the birth canal as a "bony skeleton and muscle." [363b, line 25] He admitted that with a brow presentation, depending on the amount of time spent in contact with the birth canal, one can see this molding, and that if Antonio had spent a few hours in a brow presentation, he could look like Antonio's molding pattern in the photograph. [364b, lines 5-18]

The newborn hospital photograph, which was in color at trial, in addition to molding displayed edema, redness, and bruising, as explained infra. Further, it revealed neurologically significant abnormalities indicative of acute brain injury including extreme right lateral eye deviation and a left sided "cortical thumb." [220b-226b]

The appellants hope that this court simply reads the dictated after the fact delivery note [14b] and pays no attention to the actual moment to moment recordings of this fetus and uterus known as the fetal heart monitor strips/uterine pressure recordings. The strips are part of the medical records, just like EKG's, X-rays or other monitoring paper work generated during any hospitalization. The monitoring recordings are kept in the regular course of obstetrics, were the recordings from which observations and other records were made, and are in and of themselves sufficiently powerful evidence to uphold the verdict in this case.

In fact, which is more complete or accurate? The dictated delivery note [14b] alleging the existence of "an early deceleration", the intravenous induction record allegedly kept from 11:35 a.m. to 5:30 p.m. [11b] which

fails to reference any deceleration, or the actual continuous fetal -uterine monitor recordings [23b-88b], omitted from all appellants' Briefs and Appendices, which all obstetrical witnesses, including the defendants, relied upon and agreed displayed repeated and severe decelerations? The Oakwood records including the monitoring records were admitted without objection. The most accurate moment to moment medical record of fetal well-being and the activity of the uterus was staring each Oakwood employee, each testifying witness and each juror right in the face: nine (9) hours of fetal and uterine recordings.

Viewing the continuous fetal-uterine monitoring recordings, Dr. Gennaoui admitted to contractions lasting 3 minutes which is abnormally long (over one minute is abnormally long) [271b] and called it "coupling" of contractions; he agreed that the reason the fetus needs a one minute or more resting period between contractions is because of the need for oxygen [269b]; he admitted that severe variable decelerations of the fetal heart rate are "significant to fetal well-being" [272b, lines 17-23] and indicate the decrease of oxygen to the fetus [273b]; he admitted to the existence of severe variable decelerations on the monitor strips [273b]; he admitted that he stopped the Pitocin because of the "persistence of the deceleration [276b]; he admitted that uterine contractions must be observed continually and the flow of Pitocin must be shut off immediately if a uterine contraction exceeds1 minute in duration or if the fetal heart rate decelerates significantly. [280b-281b, lines 4-6]

The facts in evidence make not just a plausible case, but an overwhelmingly convincing prima facie case. Plaintiff's causation expert, pediatric neurologist Ronald Gabriel, M.D., testified that plaintiff's brain injury was caused by a "traumatic component as well as a vascular component." [215b-216b] He explained the interchangeable connection between lack of blood flow and lack of oxygen (hypoxia) in the fetus in saying that there was "Reduced blood flow and because the blood flow is reduced that reduces the oxygen in delivery." (244b-245b]

The appellants have completely omitted Dr. Gabriel's testimony concerning reduction of blood flow to the fetus mechanism of injury from their Brief and Appendix. [208b, lines 9-13] He testified to it, and it matches

exactly Dr. Gatewood's testimony where he spoke about compression of the fetal blood supply and hypoxia. As a pediatric neurologist and pediatrician, Dr. Gabriel identified reducing blood flow to the fetus and to the fetal brain as causal mechanisms of injury in explaining at trial all the mechanisms for the effects of Pitocin. [207b-208b, lines 9-13] Hence, Dr. Gatewood's testimony which at times discussed "hypoxia" and Dr. Gabriel's testimony which referred to "reduced blood flow" or "reduced profusion" is referring to the same mechanism of reduction of oxygenated blood flow to fetus and to fetal brain. Often, this is referred to as "hypoxia-ischemia." Further, Dr. Gatewood made it clear that although he did testify to the existence of excessive Pitocin, excessive contractions, and hypoxia, he was not a neurologist, and deferred to a pediatric neurologist. [155.2b,155.4b,155.6b,155.8b] Hence, together, Dr. Gabriel's and Dr. Gatewood's testimony was entirely logical and consistent, and based on the facts in evidence, established that the negligent use of Pitocin was a cause-in-fact and a proximate cause for plaintiff's brain damage, and is more than enough to sustain this verdict on appeal.

Based on the extensive facts in evidence, Dr. Gabriel agreed that in his opinion there was, in addition to diminished blood flow, the existence of trauma: **"trauma plus diminished blood flow."** [245b] These are exactly the potential mechanisms established by Defense causation expert neonatologist Steven Donn, M.D., who testified that the mechanisms by which Pitocin can harm a fetus are two-fold and "include **trauma and hypoxia**. There may be trauma from excessive contractions of the uterus. There may be hypoxia by having a decreased amount in the blood flowing to the fetus." [364, lines 8-15] Hence, Dr. Donn further endorsed how the word "hypoxia" refers to the lack of fetal oxygenated blood flow.

Defendant Dr. Gennaoui agreed that an adverse reaction to oxytocin (Pitocin) "includes trauma to the infant, for example, hypoxia and intra-cranial hemorrhage." [265b] Defendant Dr Kittur admitted during his trial testimony that induced uterine hyper-motility by oxytocin (Pitocin) can cause permanent brain damage in the infant [359b, lines 5-9] and defense expert obstetrician Mitchell Dombrowski, M.D. admitted that Pitocin can cause

trauma to a fetus [288b, lines 1-5), can damage fetuses, [287b, line 25] and that the resistance of the birth canal to the descent of the fetal head may cause intra-cranial trauma. [(291b, lines 19-23)] Dr. Ziegelman agreed as well that "trauma" to the infant can occur under the stimulus of Pitocin. [315b, lines 15-18]

Standard of care defense testimony in this case also came from obstetrician Mitchell Dombrowski, M.D., who testified unequivocally that according to the standard of care as of 1980, induction of labor should not be attempted in cases of unengaged fetal head. [289b, lines 8-16]. Defense standard of care obstetrical expert Seymour Ziegelman, M.D. testified that nonetheless, when Pitocin was started in this case, Ms. Craig was carrying a fetus with an unengaged head [312b, lines 20-23] and further agreed that Pitocin ran for five hours and 45 minutes in this case with an unengaged head. [311b, lines 11-13] Defendant Dr. Gennaoui admitted this as well. [264b, line 13-15] Hence, it was a breach of the applicable standard of care to have given Pitocin at all - even according to the testimony of the defense standard of care experts! [8]

Directly utilizing the hospital records, Dr. Gatewood testified in great detail about the inappropriate and excessive Pitocin administration. [140b-155b, 48a (contraction coupling, not full relaxation between contraction reducing blood flow to the baby resulting in decreased oxygen), 49a-50a, 156b-159b, 160b, 162b-164b, 170b, 173b -179b, 186b-200b, 54a-55a]

Following the exact sequence from the hospital record itself, Dr. Gatewood went through a demonstration displaying exactly how Pitocin had been set up and how wrongfully and negligently the Pitocin had ended up in both I.V. solutions piggy-backed and running into the patient. [188a, 146b-155.2b] Defense expert Seymour Ziegelman, M.D. also admitted that any dual Pitocin set-up would be a deviation from the standard of care. [315b-316b]

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[8]For example, "The administration of oxytocin by any route with the head not engaged should be condemned." J.F. Jewitt, M.D., *Induction of Labor and Amniotic Fluid Infusion*, The New England Journal of Medicine, Massachusetts Medical Society, Committee on Maternal Welfare, p. 548-9, (March 4, 1976).

(2) An attempted fetal resuscitation took place at 98902.25 (1/4th) according to the "O2" note (oxygen) on the monitoring strip, [85b] which corresponds to 5:58 p.m. This is also recorded in the continuation of the Nurse's Notes which was also omitted from Appellants' Briefs or Appendices. [18b] [Also on 85b] Due to the repeated severe decelerations in the fetus, an attempted resuscitation of the fetus was attempted through the mother who was given oxygen by mask at 7 liters per minute [18b] until delivery which took place 53 minutes later at 6:51 p.m. The Nurse's Notes also document "decelerations." As can be seen from the fetal-uterine monitoring recordings, the repeated decelerations had been going on for a very long time (hours) before the oxygen was given and the Pitocin was belatedly stopped due to their occurrence.

(3) The video trial testimony of defendant Oakwood obstetrician Ajit M. Kittur, M.D. was taken on January 3, 1997 and played at trial on May 13, 1997 [332b-360b] and was also completely omitted from Appellants' Briefs and Appendices. Dr. Kittur testified that the mother was given 50 mg of I.V. Demerol, a narcotic pain reliever, which to him suggested that the mother was "experiencing significant pain" at the time. [353b,at 256-257, lines 2-25, 1-25] He also testified that if and when there are moderate contractions every 2 to 3 minutes, it would be a deviation from the standard of care in 1980 to further increase the Pitocin infusion rate - contrary to what was done in this case. [346b, at 181-182, lines 20-25, 1-3] Testimony elicited from Dr. Kittur emphasized his reading of the medical records including the fetal-uterine monitoring recordings. He stated that the external uterine pressure monitor can indeed show abnormalities of frequency and duration of the contraction. [337b-338b, at 31, lines 12-13)] He defined "hyper-tonicity" of the uterus as an increase in the baseline pressure or resting pressure [338b, at 32, lines 7-11] and "hyper-contractility" as an increase in uterine contraction frequency. [338b, at 32, lines 11-13] He testified that there must be at least a 60 second interval of "resting tone" between contractions. [338b, at 33, lines 2-4, 6-7] He testified that a "tachycardia is a heart rate about 160 beats per

minute"[9] [340b, at 54, lines 11-12] and that a bradycardia "is a heart rate below 120, below 110 really, because some books mention 110 to 150 as the baseline." [340b, at 53, lines 22-25] He stated that Variable Decelerations are a "form of cord being compressed." [343b-344b, at 90, lines 4-5]

Later in trial, defense obstetrical expert Seymour Ziegelman, M.D., testified that one of the things that can cause variable decelerations is fetal head compression [319b-320b, Lines 3-13, lines 11-12] and that it is also commonly caused by cord compression. [321b, lines 10] It was also established that Dr. Kittur's definition of a severe variable deceleration is when the fetal heart rate falls to 60 beats below baseline (e.g. from 130 to 70) or when it falls to an actual 60 beats per minute. [343b-344b, at 90, lines 16-20] The link between the decelerations and compression of the blood flow to the baby's brain (hypoxia-ischemia) and compression of the fetal head was therefore well established by even the defendants and other defense witnesses who testified to repeated severe decelerations.

(4) Although his testimony was completely excluded from Appellants' Briefs and Appendices, defendant Dr. Kittur testified that based upon the fetal-uterine monitoring recording, at one point the observers of the monitor were "up the creek." [353b-354b, at 262, lines 12-14] Dr. Kittur also made the following significant findings including repeated severe variable decelerations: Dr. Kittur stated that the baseline uterine pressure may have been elevated early on even at 39401 [348b, at 222], that there was less than a 30 second inter-contraction time at 39403 [348b, at 223], that at 39408 the strip ends at about 1:06 p.m. and that Part II begins again at 1:54 p.m. [349b, at 234]. Dr. Kittur thought that there could have been an "early variable deceleration" at 98853 [341b, at 75], variable decelerations at 98855 [341b, at 75, lines 14-17], two and part of a third deceleration at 98857 [341b ("variables")], more significant findings at 98858 and 98859 ("two variable decelerations noted with each of those contractions that are fully recorded") [341b, at 76], 98860 to 98861 ("variable deceleration"), 98864 (variable

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[9]Antonio's heart rate in the newborn nursery less than an hour after birth is tachycardic at 160. [19b]

deceleration just before it) [341b, at 76], 98865 (variable deceleration)[341b, at 77], 98866 and 98867 (variable decelerations) [341b, at 77, lines 24-25], 98868 and 98869 (variable decelerations)[341b, at 78], 98872 (Two contractions, first one lasts about 3 minutes if it's a contraction)[353b, at 259], 98874 (two decelerations) [342b, at 81] ("So at this point in time the uterine contractions are not being adequately monitored as of this strip at 874?" "Yeah") [353b, at 261, lines 19-22](It could be tetany, might not be tetany...I couldn't say) 353b, at lines 7-18] ("once again when you don't know where the uterine contraction begin and ends, **you are up the creek**, you don't know") [353b-354b, at 262, lines 12-14], 98876 (variable decelerations) [342b,at 81, lines 17-21] (3 contractions seen, the first lasts over a minute, deceleration down to 90) [354b, at 263 and 265], 98880 ("variable decelerations with contractions returning to baseline just preceding the end of the uterine contraction") [342b, at 82, lines 7-10], 98882 (one variable deceleration, possibly one more) [342b, at 82, lines 14-24], 98884 ("same pattern continues, you have episodes of variable decelerations") [342b, at 83, lines 3-7], 98885 (variable deceleration) [342b, at 83, lines 11-14], 98889 (more variable decelerations) [342b, at 84, lines 4-5], 98890 (deceleration down to 80) [356b], 98891 (variable decelerations) [342b, at 84, lines 9-10], 98893 (variable decelerations continue)[342b, at 84, line 17], 98895 (decelerations continue), 98896 (not sure when the contraction ends, deceleration lasts longer than the one before it "so there is a possible element of slow recovery")[342b-343b, at 84-85, lines 21-25, 1-3], 98897 ("variable deceleration with recovery that occurred just before the contraction sets in again")[342b-343b, at 85, lines 6-10], 98899 ("four episodes" of "variable deceleration with delayed recovery") [342b-343b, at 85-86, lines 23-25, 1-4), 98902 (Notation on strips for Oxygen being started at 7 liters) (oxygen is "probably given for severe variable decelerations that were recurrent") [356b, at 279, lines 17-18], 98904 ("there is a drop" and variable decelerations) [343b, at 88, lines 20-25], 98905 (three variable decelerations with the contractions) [343b, at 89, lines 4-6] (variable decelerations are a form of cord being compressed) [343b-344b, at 90, lines 4-5], 98905 (identifies fetal heart rate dropping to 60 here in this strip meeting definition of severe decelerations) [343b-344b, at 90-91, lines 16-24, 1-3, 10-12] (three (3) severe

variable decelerations directly corresponding to each uterine contraction) [342b, at 282].

(5) At trial, defendant Dr. Gennaoui examined the continuous fetal-uterine monitoring recordings [23b-88b]. He agreed that a baby needs at least one minute uterine rest between contractions "because of the need for oxygen." [269b] Dr. Gennaoui admitted that the Pitocin had to be stopped at 6:00 p.m. because of repeated decelerations with uterine contractions, not just one, and said that the Pitocin was suddenly stopped "because they were consistently repeating themselves." [252.1b)] He admitted that "early deceleration" is something that is "significant for head compression." [251b] He agreed that the early decelerations are caused by head compression, from a "kind of pressure or force on the head [which] leads to early decelerations." [279b]

(6) On the basis of the record, including the fetal-uterine monitoring recordings, Dr. Gennaoui also admitted at trial that the care delivered deviated in several ways, several times, from the standards of care. For example, one of several standard of care questions put to Dr. Gennaoui was whether "under all the circumstances that you're aware of, specifically the review of the tracings, which we did today, in light of that and in light of those same 64-66 minutes that we reviewed together with the jury, were there, indeed, deviations from the standard of care?" His answer was an unequivocal "yes." [268b] Defendant Gennaoui admitted that "the uterine contractions must be observed continually and the flow shut off immediately if they exceed one minute in duration or if the fetal heart rate decelerates significantly." [263b,281b, lines 4-6] He admitted to only seconds taking place between contractions examined on 49b [270b], admitted to contractions lasting abnormally long [271b], admitted to seeing "coupling" of uterine contractions on the fetal-uterine monitoring strips [271b] and that a baby needs at least one minute or more resting period between contractions because of the need for oxygen. [269b] Dr. Gennaoui examined the strips and admitted to seeing severe variable decelerations with every contraction" [273b]. He admitted that in January, 1996, at his deposition, his reading of the fetal-uterine monitoring strips identified repeated severe decelerations. [275b]

(7) At deposition, on January 5, 1996, Dr. Gennaoui had testified to his actual reading of the fetal-uterine

monitoring recordings, and described a pattern of escalating decelerations beginning as early as 98874 (4:08 p.m.), increasing in frequency at 98880 (4:32 p.m.), and finally a pattern of repeated and persistent Severe Variable Decelerations with every contraction at 98899 [83b] (5:48 p.m.) and continuing until the strips ended at about 6:28 p.m. before the delivery, which was at 6:51 p.m. [95b] Since panel numbers are four (4) minutes apart, and the internal fetal monitor was placed at 2:30 p.m. at panel 98849.5 , we know that 98899 was about 198 minutes later at 5:48 p.m. The Pitocin wasn't stopped until 12 minutes later at 6:00 p.m. [89a], almost two hours after the time when, according to Dr. Gennaoui, the repeated decelerations in fetal heart rate began. He noted Apgars of 8 and 9 in the medical record which are values conflicting with the nursing note. [95b]

The fetal-uterine monitoring strips speak for themselves - they are HORRIFIC and consistent with fetal brain injury exactly as described by plaintiff in this case. Defendant Gennaoui had stated that for a healthy baby one wants contractions that last no longer than 60 seconds and frequency of no less than one minute apart. [98b-99b] He testified to the two causes of decelerations that he knew of, being either "head compression" or "cord compression." [97b] Dr. Gennaoui indicated that one could not tell if a contraction is at a resting point simply by hand, [102b] addressing the need for uterine pressure monitoring. He acknowledged that if there is a slow return to baseline following a deceleration it indicates a decrease in the oxygen reserve of the fetus. [104b] He agreed that severe decelerations are negatively significant to fetal well-being and that the variable decelerations indicated "the decrease into the oxygenation to the fetus." [337b-338b] He saw decelerations on panels 98874 ("variable"), 98880 ("early"), 98882 ("variable could be late"), 98884 (variable), 98885, 98886 (down to 80 beats per minute) [114b], 98888 (variable down to 90) [116b], 98890 and 98891 (variables) with decreased variability after this panel for one to two minutes [120b], 98893 (variable), 98895 (drop to 60 beats per minute), 98896 (variable), 98897, 98898, 98899 ("Severe deceleration" and the next one has a "slow return to baseline")[124b, lines 19-21], 98900 (bottoms out below 30) [126b], then decelerations with every contraction [126b, lines 24-25], 98901 ("There is an increase in the tone in the way it's most...you see a sudden increase in the uterine activity, the intensity of

contraction...") [127b, lines 6-10], 98902 (Severe) [128b], 98903 (Severe Variable) [129b], 98904,5,6,7,8 and 9 (Severe variable deceleration with every contraction) [130b-131b]. Looking at panel 98901, he also testified to increased uterine tone, a sudden increase in uterine activity, and increased intensity of contraction at the time of the severe decelerations. [127b, lines 6-10]

(8) At trial, Dr. Gennaoui admitted that the severe variable decelerations seen on the monitoring strips in this case are "significant to fetal well-being...because by definition variable deceleration is related to cord compression" and that severe variable decelerations indicate the decrease of oxygen to the fetus. [272b-273b]

(9) Dr. Gennaoui admitted at trial that the fetal-uterine monitoring strips demonstrated that Ms. Craig was "exquisitely sensitive to Pitocin at just **two"** milliunits per minute I.V. infusion rate [262b, line 14]; admitted that the infusion of Pitocin was supposed to have been maintained at the lowest possible infusion rate to allow adequate progression of labor [264b]; and then admitted that Pitocin was gradually increased over time to [a whopping] 18 milliunits per minute (nine times the rate at which Ms. Craig's uterus had already admittedly demonstrated exquisite sensitivity) without decrease, continuously for at least 2 and ½ hours! [264b]

(10) As stated, Dr. Gatewood went through and reviewed the continuous fetal-uterine monitor recordings at trial and demonstrated the rather obvious findings found therein as well. With respect to the uterine pressure recordings, for example, one can see an obviously prolonged contraction with another following too closely at 98845 [55b]. The continuous external uterine pressure recording does permit the observer to view the relative proportional rise and fall of pressures, the absence of a rise or fall, the beginnings and ends of contractions, and the between-contraction state, or resting state if the uterus comes to rest. The monitor can discern whether a contraction has ended and indeed whether it has come back to the resting state. A non-relaxing or climbing baseline uterine pressure can be seen frequently in Antonio's pressure recordings which should have signaled a change in the Pitocin administration. [For example, without exclusion, at 57b, 60b, 61b, 62b, 65b, 66b, 67b, 68b 69b, 70b, 71b, 73b, 75b, 76b, 77b, 78b, 79b, 80b, 81b, 82b, 84b, 85b] Was any capable physician or nurse

around who was actually looking at the fetal-uterine pressure recordings? The record would indicate in the negative. The Pitocin wasn't stopped until someone finally noticed the decelerations at 6:00 p.m.[11b] which was panel 98902. [84b] (Clocked by using the internal fetal electrode placement at 98849.5 as 2:30 p.m. and four minutes per panel number thereafter.) Too painful to look at, horrible severe decelerations at one point down to zero or a fetal heart rate below 30, with the uterine pressure gain on the machine turned to zero, [83b] can be viewed at panels 98898 - 98900, 16 minutes before the Pitocin is stopped! Certainly it was obvious to the jury, and obvious to anyone looking at the monitoring strips, and Plaintiff should not have to once again prove, now to the Michigan Supreme Court, that a fetal heart rate down to less than 30 [83b], after repeated and progressively worsening decelerations in fetal heart rate beginning at 98866 [66b] (2:36 p.m.), which continued till the monitoring strips ran out at 6:28 p.m. at 98909 [88b], were indicative of diminished blood flow and therefore diminished oxygen delivery and head compression, which were proximate causes of damage to this fetal brain.

(11) In the initial nurse's examination, at 19b the nurse recorded her observation: "*large* umbilical cord moist and clamped." This recorded observation of cord enlargement was a fact in evidence. Testimony regarding the compression of the blood supply to the fetus during labor, which included the cord, came from multiple witnesses. Interestingly, defense witness Dr. Dombrowski, M.D., obstetrician, testified and conceded that there "can be significance to this baby having a large umbilical cord." [247b-248b,lines 22,23, 1]

(12) In the initial nurse's examination, excluded from Appellants' Briefs and Appendices, at 19b, the nurse recorded: "Molding of head." This entry in the record, as a fact in evidence, definitely establishes the prior existence of head compression and trauma! Mitchell Dombrowski, M.D., was asked by defense counsel about physical findings in a hypothetical newborn following trauma, and **the first thing he identified as indicative of "trauma" was "molding of the head:"**

> Q: What about trauma from some other means coming through the birth canal, Doctor, what would the baby have looked like if it was **traumatized** coming

through the birth canal? [298b]

Q: What would you expect he would have looked like if it was **traumatic**?

A: The most common thing is **molding of the head**, actually not overlapping of the sutures, that's quite rare... [299b-300b] [emphasis added]

(13) In the initial nurse's examination, nearly an hour after birth, excluded from Appellants' Briefs and Appendices, at 19b the nurse recorded the newborn's respiratory rate at 64 which represents tachypnea, or abnormally elevated rapid respirations.[10] Subsequently, respiratory rate was noted as "unchanged." The heart rate was 160, which was a "tachycardia." [340b, at 54, lines 11-12]. Ronald Gabriel, M.D., pediatric neurologist, testified that the normal newborn respiratory rate is up to 45 and that the rate of 64 is "abnormally fast," which is particularly significant given the likely explanation that Antonio was "blowing off excessive acid because of the brain injury." [218b] Mitchell Dombrowski, M.D., obstetrical expert witness, explained the mechanism driving tachypnea after oxygen deprivation, where a child would "blow off more CO2 and he'd breath more rapidly." [294b, lines 21-23] (14) On 22b, the newborn nursery flow record, the initial recording of the skin was "black" before being recorded the next day as "clear." The defense at trial attempted to state that "black" and "clear" on exam were references to race. Skin color is an important physical finding at birth and routinely followed and recorded. Healthy newborns are pink according to testimony at trial, and are not black, dark, dusky or grey. Antonio's newborn skin exam was noted as having changed in the record from "black" to "clear." [22b] See also the newborn examination by the nurse, excluded by Appellants' Briefs and Appendices, on 19b, which stated: "color of skin black." [19b]

(15) Corroboration for a forehead molding pattern was identified by defense witness Stephen Donn, M.D., Director of Neonatology at the University of Michigan. [361b-362b] The Newborn Hospital Photograph [20b] establishes and displays an obvious protuberant swollen raised area across the newborn's entire forehead

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[10] The most used pediatric textbook states that the normal respiratory rate in a newborn is 35-50 breaths/min. Page 16, *Nelson Textbook of Pediatrics*, 14th Ed. (1992)

just above the eyebrows [20b] which is a fact in evidence helping to definitively establish the consequence of the head undergoing a traumatic force in traversing the birth canal.

The existence of this forehead swelling establishes that trauma could and did occur to the fetal head in this case. The photograph [20b] was examined by neonatologist defense expert Dr. Donn at trial who testified that it did reveal a molding pattern "over the whole surface of the forehead starting above the eyebrows" [363b, lines 14-16, 17-18] Dr. Donn stated that the forehead molding pattern was caused by the birth canal on the head as it passes through. [363b, lines 21-22] Dr. Donn described the birth canal as made up of a "bony skeleton and muscle..." [363b, line 25] He refused to place a name to the pattern definitely, but admitted that, hypothetically, whether this molding was indeed a brow pattern, would depend on how much time Antonio spent in contact with the birth canal, and that one can expect this type of molding of the forehead if Antonio had spent a few hours in a brow presentation in the birth canal. Thus, it was possible that a brow type molding pattern matched the appearance of Antonio's molding pattern in the photograph. [364b, lines 5-18] Dr. Donn, and the defendants-appellants did NOT and do not offer any alternative explanation for the forehead molding that Dr. Donn had identified in the photograph other than to ask this court to deny its existence.

(16) The newborn photograph[20b] also displayed an additional neurological physical finding: a "cortical thumb." Pediatric neurologist Dr. Ronald Gabriel testified that this obvious cortical thumb, as depicted on the photograph, as a fact in evidence, is a well known significant neurological "cortical" physical finding on examination, and cortical refers to brain cortex, so the finding is a reflection of "some damage having occurred to the right side of the brain" [170b, 172b, 173b]. Dr. Gabriel also correlated this photograph's findings with the MRI of the brain [172b-173b], and explained it as a "classical sign of either temporary or permanent brain injury." [184b] The later EEG findings revealed a focal right frontal focus as well. [89b-92b]

(17) The newborn photograph [20b] displayed yet another obvious newborn neurological physical finding: extreme right lateral deviation of the eyes. Again, this was and is an obvious fact in evidence.

Michael Nigro, D.O., defense expert pediatric neurologist, agreed that eye movements to the right, as depicted in the newborn picture, would be consistent with a right hemisphere cortical brain problem if the eyes were staying in that position consistently. [328b-329b] Ronald Gabriel, M.D., expert pediatric neurologist, testified that the picture was "not the picture of a normal newborn," [220b] as the extreme deviation to the right of the eyes was an abnormal neurological physical finding which reflected some "damage having been done to the right side of the brain..." [223b] Consistent with this clinical picture evident at birth, and the brain injury most severe to the right brain, subsequent EEGs reveal a right frontal lobe brain focus of abnormal activity. [89b-92b]

(18) The newborn photograph [20b] was in color at trial and was further observed by Dr. Gabriel to display a right eye somewhat swollen shut when compared to the left, "indicating a degree of edema or fluid...an area that was "raised and darker" compared to the left side, and some "swelling redness" on the right side of the forehead that was not seen on the left. [222b] If any of this wasn't true, the trier of fact who was also looking at the photograph would know it and would have seen it.

(19) Defendant Dr. Kittur testified and acknowledged the fact that he saw in the records no suggestion that a physician examined the infant in the first 24 hours of life. [358b-359b, at 292] Dr. Kittur admitted that he was surprised by this fact and admitted that "it was a little unusual." [358b-359b, at 292, lines 1-14] Defense expert neonatologist Steven M. Donn, M.D. testified that there was no evidence that any physician examined Antonio at any time on 7-17-97 [362b, lines 5-8], or at any time in the first 24 hours of life. [362b, lines 9-15][11]

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[11] It is uncontested that a newborn examination by a physician within 24 hours of birth is mandatory under the standard of care in this country. (This standard of care was not at issue or causally related in this case.) Without an examining physician, when the tree falls, no one is there to hear it. A raised area over an entire forehead is evidence that a force took place to create it. If the law were to eliminate circumstantial evidence, deduction or inference as proof of causation, it would make it impossible for anyone to ever overcome this philosophical causation conundrum. Sherlock Holmes would be of no assistance. Currently, we are left with medical record statements such as, for example, "Decelerations noted Gennaoui aware" in the nursing notes - less than frank disclosure, but providing an inference that there was a worried nurse present, and who recorded the fact that she had placed Gennaoui on notice of a problem with the labor.

Dr. Gennaoui had testified at deposition that he did not do the Apgar testing which is done by the nursing staff. [107b, line 17] Dr. Gennaoui acknowledged, but couldn't explain, why there were two different pairs of one and five minute Apgar scores recorded in the chart.

(20) The first and only recorded physician examination of Antonio in the entire Oakwood Admission Record was a brief note written by a pediatrician on the third day of life (7-18-80) which stated, in pertinent part, that the newborn was generally "alert & active," and under central nervous system ("CNS") exam the brief note merely stated: "good moro, suck." That is it. These are the most basic of reflexes. This is two days after the newborn tachypnea and tachycardia, color black, swollen forehead and molding which was noted by the nurse at 7:45 p.m., 54 minutes of life. [19b] The note on the third day of life does not reflect even a basic neurological examination of the movements or positioning of the eyes, posturing of the hands, hip clicks, resistance to motion, muscle tone, deep tendon reflexes, or other reflexes - they are not described. Blood gases were not done. No other neurological information. Antonio is there for 3 days of his life and has one brief note documenting that an examining physician actually saw him face to face. Other than obstetrician Dr. Gennaoui seeing the newborn exit the vagina, after he gave the pudendal anesthetic block and made the episiotomy, it would be a lie to suggest that the Oakwood medical record provides more of a newborn examination by any physician.

III. ARGUMENT

A. GIVEN THE FACT THAT THE LOWER COURT, ON THE RECORD, GRANTED OAKWOOD'S REQUEST TO FILE FURTHER PLEADINGS ON THE DAVIS-FRYE ISSUE PRIOR TO DR. GABRIEL TAKING THE STAND, THAT THE COURT STATED THE DENIAL OF THE HEARING REQUEST WAS JUST HER RULING "TODAY" AND THAT OAKWOOD COULD "SUBMIT ANYTHING ADDITIONAL" AND SHE "WILL TAKE A LOOK AT IT," [44a, LINES 12-15, AND 45a, LINES 5-8], THAT OAKWOOD AGREED ON THE RECORD THAT IT WOULD DO SO, AND THE RECORD IS CLEAR THAT NO FURTHER PLEADINGS WERE EVER FILED AS TO THE DAVIS-FRYE ISSUE, AND THE DAVIS-FRYE HEARING WAS NEVER RAISED

BY OAKWOOD BEFORE THE VERDICT, THIS COURT SHOULD FIND THAT OAKWOOD ABANDONED THEIR REQUEST FOR A DAVIS-FRYE HEARING, FAILED TO PRESERVE IT, AND DENY THEIR DESPERATE ATTEMPT TO RESURRECT IT ON APPEAL.

B. GIVEN THE FACT THAT OAKWOOD IDENTIFIED THE BASIS FOR THE PRE-TRIAL REQUEST FOR A DAVIS-FRYE HEARING AS AN ALLEGED DISPUTE OVER "WHETHER PITOCIN CAN CAUSE TRAUMATIC HEAD INJURY AGAINST MOTHER'S ANATOMY," [41a, LINES 21-25], WHICH EVERY TRIAL WITNESS ESTABLISHED AS UNIVERSALLY HELD AS TRUE, THIS COURT SHOULD RULE THAT THE COMPLETE LOWER COURT RECORD MAKES IT CLEAR THAT THERE WAS NO BONA FIDE DAVIS-FRYE ISSUE OR "NOVEL" DAVIS-FRYE EVIDENCE EVER RAISED IN THE LOWER COURT AND THAT THE LOWER COURT DID NOT ERR WHEN ASKING THAT THE REQUEST FOR A DAVIS-FRYE HEARING BE ACCOMPANIED BY SOMETHING MORE THAN THE ATTORNEY'S OWN WORDS.

C. WHEN A DAVIS-FRYE HEARING REQUEST WAS MADE BY OAKWOOD WITHOUT ANY EXPERT AFFIDAVIT OR LITERATURE SUPPORT, AND THE PLAINTIFF CAME FORWARD IN HIS RESPONSE [6b - 10b] WITH SUBSTANTIAL EVIDENCE OF WIDESPREAD SCIENTIFIC SUPPORT, RELIABILITY AND ACCEPTANCE OF ONE OF HIS CHALLENGED EXPERT'S TESTIMONY WHICH EXPRESSED A PITOCIN INDUCED HEAD COMPRESSION TRAUMA MECHANISM OF FETAL HEAD INJURY, AND THE RESPONSE INCLUDED MAIN- STREAM LITERATURE CITATIONS, NEONATOLOGY TEXTBOOK EXCERPTS AND THE PHYSICIANS DESK REFERENCE (PDR), WHICH IS OVERSEEN BY THE FDA, THE LOWER COURT DID NOT ERR TO HAVE DENIED OAKWOOD'S REQUEST ON THE DAY OF THE HEARING AND TO HAVE GRANTED OAKWOOD'S REQUEST TO FILE FURTHER PLEADINGS.

D. WHEN APPELLANTS GENNAOUI AND ASSOCIATED PHYSICIANS NEVER REQUESTED A DAVIS-FRYE HEARING AND NEVER RAISED ANY DAVIS FRYE ISSUE BEFORE OR DURING TRIAL, THEY FAILED TO PRESERVE THE ISSUE.

Standards of Review The admission of expert opinion testimony will not be reversed on appeal absent an abuse of discretion. Rouch v Enquirer & News (1990), 184 Mich App 19, 457 N.W.2d 74, 17 Media

LR 2305, app gr (1991), 437 Mich 1035, 472 N.W.2d 637 and vacated on other grounds (1992), 440 Mich 238, 487 N.W.2d 205, 20 Media L R 2265, reh den (1992), 440 Mich 1209, 488 N.W.2d 736 and cert den (1993), 507 US 967, 122 L. Ed. 2d 774, 113 S Ct 1401, reh den (1993) 507 US 1407, 123 L Ed 2d 507, 113 S Ct 1891.

Under MRE 702, the Davis-Frye standard is applied to determine if "*novel* scientific evidence has gained general acceptance in the scientific community." People v King, 158 Mich App 672, 675; 405 N.W.2d 116 (1987) cited by People v Marsh, 177 Mich App 161; 441 N.W.2d 33 (1989). See also People v Young, 418 Mich 1, at , 340 N.W.2d 805; (1983) ("We hold that the admissibility of novel scientific evidence is governed by the Davis-Frye standard"). The determination of whether scientific evidence is "novel" would be a decision made concerning the admissibility of evidence, and therefore is reviewed according to an abuse of discretion standard. Gagnon v Dresser Industries Corp,130 Mich App 452, 463; 344 NW2d 582 (1983), aff'd 424 Mich 166 (1985). Errors in the admission or exclusion of evidence are harmless, and shall not be disturbed on appeal unless "refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A) An "abuse of discretion" was defined in Spalding v Spalding, 355 Mich 383, 384-5; 94 NW2d 810(1959) as follows:

> An abuse of discretion involves far more than a difference in judicial opinion between the trial and appellant courts. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. Cited with favor in Carbonell v Bluhm, 114 Mich app 215, 222; 318 NW2d 659, 662 (1982).

ARGUMENT: Oakwood filed a motion *in limine* on the first day of the then-scheduled trial which asked the lower court to exclude all testimony from pediatric neurologist Dr. Gabriel, *and in the alternative* asked for a Davis-Frye hearing. [1b - 5b] The written motion did not identify the specific issue, and contained only the defense counsel's blanket opinion and attached the entire discovery deposition transcript of Dr. Gabriel

without any other type of support. No Order was ever entered or proposed by Oakwood - they abandoned the issue. As of today, Oakwood still hasn't produced any support for its fabricated previously abandoned dispute that oxytocin cannot cause traumatic head injury against mother's anatomy. Gennaoui and Associated Physicians never raised any Davis-Frye issue or asked for a hearing.

The appellants, desperate on appeal, are apparently attempting to resurrect Oakwood's previously abandoned argument as stated by Oakwood on the record at a motion hearing held on January 21, 1997:

> "It is not disputed that use of Pitocin can lead to hypoxia which can cause brain damage. **What is disputed is that use of oxytocin can cause traumatic head injury against mother's anatomy. That's what's in dispute here.** " [41a, lines 21-25] [emphasis added]

Notwithstanding his admission of the effects of Pitocin on fetal brain, the implied assertion, totally unsupported then and now, was that oxytocin cannot cause traumatic head injuries against mother's anatomy. As was unanimously expressed by defense and plaintiff causation testimony at trial, and further corroborated by both physician defendants, nothing could have been further from the truth. This supposition, thrown in as an excuse for alternative relief three months pre-trial and then abandoned until after trial, was patently absurd on its face. Counsel for Oakwood admitted on the record that he had not actually read plaintiff's written Response to his motion. [21a, lines 2-4] After he read the Response, he no doubt dropped the issue, and the appellate attorneys picked it up post-verdict while grasping at straws.

Since the appellants are not challenging blood and oxygen reduction as a potential cause for brain injury, and both of plaintiff's experts testified to this mechanism, the entire Davis-Frye issue, which alleged a dispute involving only traumatic head injury, should be moot for this reason as well. In fact, because of this, the entire "facts in evidence" issue becomes moot and plaintiff prevails on the hypoxia-ischemia cause alone.

Although appellants fail to attach the referenced motion anywhere on appeal, plaintiff includes it in his Appendix. (Filed January 9, 1997)[1b-5 b] The motion, without specifying any particular page numbers in the

testimony, in paragraph four (4), called Dr. Gabriel's "testimony and opinions regarding plaintiff's condition and the causes for it...groundless in the extreme." In addition, paragraph five (5) of this same motion *in limine* argued that Dr. Gabriel was not competent to testify as to standard of care under the law - a point of law upon which the trial court subsequently ruled in defendant's favor and therefore is moot. The motion was non-specific but on the record the attorney for Oakwood clearly stated what he considered to be the disputed Davis-Frye issue. [41a, lines 21-25] At paragraph three (3), the written motion evinces a failure to specifically inform the court by broadly and generally stating that "The plaintiff's theories of liability and proximate cause are based on complex and unsupported medical testimony proffered by an expert who can offer no support for his scientific views other than his own opinion."

The plaintiff responded to the Motion to Exclude Dr. Gabriel's Testimony, or in the Alternative for a Davis-Frye Hearing, in writing [6b - 10 b] and included in his Response, at page three (3)[8b] and page four (4)[9b], inter alia, an extract from the 1995, or 49th Edition, pages 2708 and 2709, of the *Physician's Desk Reference* ("*PDR*"). Page four (4)[9b] of Plaintiff's Response also referenced and extracted from a very respected neonatology textbook called *Neonatology, Pathophysiology and Management of the Newborn*, by Gordon B. Avery, M.D., Ph.D., 2d Ed., 1981 which made it quite clear that the compressive detrimental effects of labor on the fetal brain were well known, accepted as fact and incorporated into an informed medical understanding of labor. In addition, Plaintiff attached a copy of Dr. Gabriel's C.V. [10b] to his written Response, briefly described Dr. Gabriel's extensive pertinent experience, [7b-8b] and brought some pertinent medical literature to the motion hearing, [13a] including a *Pediatric Annals* Article on Cerebral Palsy referencing "trauma" and "articles from the 60's" [14a].

At the hearing, the court wisely wanted more information from Oakwood and specifically asked for it:

THE COURT: The problem with your motion is you don't have any Affidavits. You don't have any evidence in here that – I mean, that there should be a Davis-Frye Hearing. I mean, it's just you as an

attorney saying that. (lines 17-21) [42a]... all you attached to your Motion is a copy of Dr. Gabriel's deposition, and then you allege that there's no scientific literature or anything to support his point of view. (lines 23-25) [42a-43a]]

THE COURT: I mean, that would mean that everybody can come in here and allege that whatever everybody's expert is saying is not supported by scientific data, and I would have to hold a Davis-Frye Hearing in every single case where any expert had to testify. And that's not the standard. You have to submit some evidence to that I need a Davis-Frye Hearing, other than you just saying it. (lines 8-15) [43a]

THE COURT: You have no evidence that that's true or that his theories aren't supported. (lines 6-8)[43a]

The Court wanted something other than the attorney's words, particularly after reading plaintiff's response. As an applicable example, an MCR 2.116 (C)(10) summary disposition motion requires more than attorney words from the movant and non-movant to support the grounds MCR 2.116(C)(10)(G)(3), and for the non-movant to establish a dispute of fact. MCR 2.116 (C)(10(G)(4) Oakwood's defense counsel (John Perrin) asked if he could indeed submit some additional pleadings and the Court made it clear she was currently only addressing the issue for "today" and granted Oakwood's request to submit further pleadings, and agreed on the record to look at "anything additional" that Oakwood wanted to submit, to which Oakwood's counsel agreed:

Mr. Perrin: *I'd like to submit* some additional pleadings *on this* prior to the time of Dr Gabriel taking the stand...[44a, lines 12-15]

THE COURT: I mean, you can submit anything additional. I will take a look at it. But that's my ruling *today*. [45a, lines 6-8]

Mr. Perrin: *Okay* [45a, lines 6-10]

Despite indicating that he would submit further pleadings, counsel for Oakwood did not submit anything further, did not submit an affidavit, and never raised the issue again - until after the verdict. Oakwood did not file a motion for rehearing. Oakwood never made any further Davis-Frye requests. Oakwood never even had an order entered on the issue because the issue was abandoned. Oakwood instead is attempting to benefit now from what they abandoned before trial. Absent a specific objection, this issue should be deemed to have been waived. People v Watts, 145 Mich App 760, 764; 378 N.W.2d 787 (1985), lv den 424 Mich 889 (1986).

Identical procedural facts led the Michigan Supreme Court to uphold a Court of Appeals ruling, and also conclude that an issue was not properly preserved for appellate review, in Jones v Porretta, 428 Mich 132, 158-159, 405 N.W.2d 863 (1987). In Jones, the trial court had stated that it would reconsider its decision when and if the attorney would present authority. Like Oakwood's attorney, whose request for an opportunity to file additional pleadings was granted, the attorney in Jones, at 158-159, was stated to have never reintroduced the issue again, leading the appellate court to "conclude that plaintiffs abandoned this issue as a matter of trial strategy. For us to reverse on this basis now might encourage parties to harbor error on the record to be used in the event of an unfavorable verdict." Counsel for Oakwood, having had its request for the opportunity to file additional pleadings granted, but never reintroducing the issue again, abandoned the issue and failed to properly preserve the issue for appeal under Jones.

It goes without saying that the idea of Pitocin causing fetal head injury wasn't and isn't "novel" and it was never in honest contention. Oakwood abandoned the issue because there is no dispute, i.e. there was and is no one who could possibly in good faith support its allegation in the lower court that Pitocin doesn't, in theory, sometimes cause traumatic injury to fetal heads against mother's anatomy. Oakwood's own witnesses refuted it at trial and it never had any merit. At the time of trial, Steven M. Donn, M.D. was director of Neonatology at the University of Michigan and quite a tough and hostile witness. He was called as a causation witness by defendants on May 13, 1997. He testified that he had published in the areas of the relationship between asphyxia, intra-partum asphyxia, that is, asphyxia during labor, and trauma during labor in relationship to subsequent neurologic outcome. Establishing and endorsing, in theory, the "two potential mechanisms," just as alleged by plaintiff in this case, Dr. Donn testified as follows:

Q: What is the mechanism by which Pitocin can harm - - Pitocin administered to a mom during labor can harm a fetus?

A: The - - **the two potential mechanisms through which injury may come about include trauma and hypoxia**. There may be **trauma from excessive**

contractions of the uterus. There may be hypoxia by having a decrease amount in the blood flowing to the fetus. [366b, lines 8-15]

Hence, contrary to the false allegation made in the defense request for a Davis-Frye hearing and in the Oakwood Brief, neonatologist Dr. Donn, along with others, testified in support of plaintiff's theories of causation and endorsed the universally held view that traumatic and ischemic-hypoxic brain injury are caused by Pitocin.

Although, like Dr. Donn, he disagreed with the ultimate conclusion made by plaintiff in this case, defense causation witness Michael Nigro, D.O., a pediatric neurologist, also testified in complete support of the existence of plaintiff's causal theories on this issue. He provided first-hand eye-witness testimony ("I've seen that") which again established and endorsed the existence of a potential causal nexus between tumultuous labor and fetal "traumatic injuries of the skull" and "closed head injury" and "trauma, injury to the brain" as follows:

> "If you had trauma, injury to the brain, if the skull is affected, and **I've seen that. I've attended newborns who had traumatic injuries to the skull, it's the equivalent of a severe closed head injury** when you look at, again, the end result. ...It's like being in an auto accident. It's like being hit by a parent. It's like being shaken. (322.6b-322.8b, lines 22-23; lines 2-13)[emphasis added]

Dr. Gennaoui agreed that "An adverse reaction to oxytocic agents, like oxytocin, includes **trauma** to the infant, for example, hypoxia and intra-cranial hemorrhage."[265b, vol. 14, p.249]

Dr. Kittur testified [359b, at 295] that he agreed that "induced uterine hyper-motility by oxytocin can cause permanent brain damage in the infant" and repeated this as true when problems with high doses of Pitocin are involved, at page.[360b at 303] Dr. Kittur agreed that "in the event of uterine hypertonicity, while the fetus is inside the uterus, mechanical trauma can occur to the fetus." [247b, at 203]

Seymour Ziegelman, M.D., testified as a defense expert obstetrician witness [304b] on May 7, 1997 and agreed that when used inappropriately, Pitocin can lead to accidents such as trauma not only to the mother, but to the infant as well. [315b, lines 15-18]

Mitchell Dombrowski, M.D., Chairman of Obstetrics at Wayne State U., agreed that Pitocin can damage fetuses and that it can "**cause trauma to a fetus.**" [287b, lines 25] [288b, lines 1-5] He agreed that tumultuous uterine contractions prevents appropriate uterine flow and oxygenation to the fetus. [291b, line 18] He admitted that the resistance of the birth canal to the descent of the head may cause intra-cranial trauma. [291b, lines 19-23]

Given the preceding cited testimony from defense witnesses Nigro, Donn, Ziegelman, and Dombrowski, defendant Kittur and defendant Gennaoui, when Oakwood's Brief stated that: "plaintiff's causation theory is not even recognized as anatomically possible in any specialized field of medical science and that the theory conflicts with the established factual record" it is quite obviously a huge appellant fabrication. In short, the appellants' Briefs are revealed to be a fraud on this court.

People v Young, 418 Mich 1; 340 N.W.2d 805 (1983), cited by this Court in its granting Order, held that "the admissibility of novel scientific evidence is governed by the Davis-Frye standard." Young involved a dispute over a novel scientific technique or method: the reliability of serological electrophoretic analysis. The Young opinion, at page 26, cited an opinion by Justice Kavanagh in People v Salvadore, 415 Mich 615; 329 N.W.2d 743 743 (1982), which reiterated that the "purpose of the Davis-Frye rule is to prevent the jury from relying on unproven and ultimately unsound scientific methods." Other Michigan cases cited in Young involved other novel scientific methods including: lie detector testing, voice print identification evidence and hypnotically refreshed testimony. No identified scientific "method or technique" was involved or challenged in this case.

Instead, the Davis-Frye request in this case merely involved an attorney's statement on the record that he was disputing the "theory" that Pitocin could cause fetal head injury against mother's anatomy. This alleged dispute over the potential existence of a Pitocin-caused fetal closed head injury, a dispute which Oakwood dropped because no one doubts the theory that Pitocin can cause traumatic head injury, involved a causation mechanism opinion which stated that brain injury arose in the fetus from a closed head injury. The fetal closed

head injury theory did not arise from or involve in any way a novel scientific method or technique, or any novel idea or theory, so the dispute does not implicate People v Young, and does not implicate the Davis-Frye rule.

Since Davis-Frye has been held to apply to "novel" scientific evidence, the threshold issue for a trial court is to initially identify the dispute, and appropriately address the issue of novelty. It would not take much for a movant to demonstrate, for the sake of argument, novelty. The plaintiff did file a Response. The lower court Judge did undertake its role as an evidentiary gatekeeper, read the plaintiff's Response to the Motion In Limine, spoke with Oakwood's counsel about their total lack of any medical support or affidavit for their request, and granted Oakwood's request to file further pleadings on the issue. She left the door open for them. Under these circumstances, the Judge served her gate keeping function admirably and, given the absence of any offering at any time from Oakwood on the issue of novelty, the issue was abandoned.

Notwithstanding the absence of a challenge to a scientific technique or method, Davis-Frye has consistently been held to be applicable only to "novel" scientific evidence. Young, at 26 ("our invariant and unanimous application of the Davis-Frye rule to the admissibility of novel scientific evidence"). Plaintiff's fetal closed head injury theory that Pitocin can cause traumatic head injury against maternal anatomy was not challenged in any way at trial, and instead was substantiated at trial by all witnesses, including defense causation witnesses Drs. Donn and Nigro, to be universally accepted, reliable, and certainly not novel. As was explained by plaintiff in his Response to Oakwood's pre-trial motion, and proven by all witnesses at trial, fetal traumatic head injury from Pitocin is universally held as a potential side effect of excessive Pitocin, and therefore, was uncontested as a potential brain injury mechanism. Not one appellant can point to any testimony that stated this is not a potential side effect of Pitocin.

Plaintiff's obstetrical expert witness, Paul Gatewood, M.D., obstetrician, testified to the presence of uterine hyper-stimulation [170b], the presence of uterine contraction "coupling" with only 10 to 15 seconds between contractions [163b-164b], elevated uterine baseline pressure [154b,173b], "coupling" without relaxation

of the uterus **with "a very hyper-stimulated uterine wall"** [177b], marked evidence of prolonged over-dosage of Pitocin [155b], and medical records indicating that Pitocin was placed in two bags provided simultaneously. [145b, 146b-153b] Dr. Gatewood continued his testimony, at 186b, lines 1-22, wherein he described placenta and cord compression, but deferred as to the brain injury[186b-187b, at line 23]: I'm not about to get up here and tell you that because of the hypoxia this is what happened to the baby's brain. That's the purview of a neurologist...."

When asked about Dr. Gabriel's opinion that included **trauma** in addition to hypoxia-ischemia, Dr. Gatewood testified that, **"It's well known in obstetrical and in neurologic that hypoxia leads to susceptibility to damage and trauma." [194b]** Dr. Gatewood's opinions were summarized again in [189b-192b, 54a-55a] where he explained that there was reduced blood flow and reduced oxygen to the baby. [193b] He further testified that when the uterus clamps down it can reduce the blood flow to the fetus. [200b] Dr. Gatewood testified, and it is not contested, that in the presence of uterine hyper-stimulation the standard of care dictates stopping the Pitocin immediately. [196b] Dr. Gatewood also repeated that the cord being compressed was anatomically "beside the head." [199b]

Ronald Gabriel, M.D., made it quite clear that he was not issuing an opinion regarding standard of care and the excess of Pitocin because that was an obstetrical judgment beyond his expertise. [77a] He confined himself to his views of the effects of Pitocin on Antonio's fetal brain from the standpoint of a pediatric neurologist experienced in the field of perinatal neurology and the effects of Pitocin on fetal brain, and expressly did not provide testimony on the standards of obstetrical practice. Defense counsel even attempted unsuccessfully to bait him into making a standard of care statement which is just one of a multitude of examples of Oakwood's counsel's attempts to generate error for appeal. [78a] ("That's an obstetrical evaluation...and I would not make a judgment regarding the use of Pitocin"); [81a] (where Dr Gabriel replies that "This is beyond my area of

competency.") Dr. Gabriel testified that after he had reviewed all the records, "I had come to the conclusion that Antonio suffered an injury during labor and delivery." [204b][79a] At 207b-208b, Dr. Gabriel described the mechanisms for the effects on the fetal brain of excessive or hyper-stimulation of the uterus from Pitocin including "direct pressure," "lack of blood flow to the fetal brain" and "Pitocin will clamp down the uterus reducing blood flow of the maternal system to the placenta so that the fetus gets less blood flow from the placenta producing reduced flow to the fetal brain." [208b, Lines 9-13]

Dr. Gabriel testified with respect to the connection between cerebral palsy and excessive oxytocin in Antonio in describing a "traumatic component as well as a vascular component...that is to say the reduced blood flow..." [215b-216b] Dr. Gabriel explained how reduction of blood flow to the fetal brain effectively means reduction of "oxygen in delivery." [244b-245b] Until appellate lawyers entered the case post-verdict, no one involved in the trial challenged the trauma causation theory as unscientific, no one would have considered it in light of how it was so overwhelmingly supported at trial. No one ever requested any Davis-Frye hearing or brought it up again after the January 21, 1997 hearing until well after the verdict.

Dr. Gabriel's testimony with respect to mechanisms of injury was solidly grounded in the literature, which he described. [208b] He cited *Neurology*, 1969, and the *Am J Ob Gyn* 1972. [210b] He recalled that an animal model utilizing Pitocin "to produce brain damage in fetuses" was the first of its kind. [211b] He stated that the basis of his opinions included the information contained in the PDR, the AMA bulletins, pharmacological textbooks, and, for example, Williams Textbook of Obstetrics as it relates to Pitocin. [212b]

Question: if Dr. Gabriel's opinions were somehow outlandish or unfounded, why didn't the defense impeach him with any of these commonly utilized source books or materials? Answer: because the "theory" was common knowledge and because he was correct, of course.

In People v Marsh, 177 Mich App 161; 441 N.W.2d 33; (1989), the Court of Appeals found that scientific

evidence like x-rays and photographs were inherently not novel, can be viewed by the jury, and therefore properly submitted to the jury without a hearing. As in Marsh, this case, in addition to newborn examinations and EEG's, involved the experts' reading of commonly used medical data recordings, such as photographs, x-rays (MRI), fetal-uterine monitoring recordings, to reach conclusions. The recordings and photographic evidence were easily viewed by the jury. The large swelling on the forehead, the right sided bruising were obvious on the photograph.

The challenge to a closed head injury theory may have started as just one lawyer's naivety or confusion. After the verdict, its resurrection becomes another example of an attempt by appellants to plant negative prejudice in the mind of the Court regarding Ronald Gabriel, M.D. or any other witness who is willing to provide competent informed professional consultation to plaintiffs in medical malpractice cases. Dr. Gabriel was educated at Yale, Boston University and U.C.L.A., was twice a fellow at the National Institute of Neurologic Disease, is board certified in both pediatrics (1968) and pediatric neurology (1973), was a Consultant to Dewitt and Walter Reed Hospitals while serving his country (achieving rank of Major) in the Army, his medical teaching experience is extensive, he has published in standard textbooks of pediatric neurology as well as periodicals, he is a fellow in the American Academy of Pediatrics, Section on Perinatal Medicine, he teaches neuroimaging, is on the board of reviewers, since 1992, for the *Journal of Perinatology*, which is the leading perinatology journal in the country, and as of 1997 had maintained for years one of the largest and busiest pediatric neurology practices in the State of California. [10b, 7b]

E. WHEN PLAINTIFF'S EXPERT, BOARD CERTIFIED OBSTETRICAL EXPERT DR. PAUL GATEWOOD, M.D., WAS COMPETENT TO TESTIFY TO THE OBSTETRICAL STANDARD OF CARE, AND PEDIATRIC NEUROLOGIST EXPERT DR. GABRIEL WAS COMPETENT TO TESTIFY AS TO BRAIN DAMAGE CAUSATION, AND EACH ON THE RECORD APPROPRIATELY DEFERRED TO THE OTHER'S SPECIALTY, AND EACH BASED THE EXPERT TESTIMONY UPON THE FACTS IN THE MEDICAL RECORDS AND ADMITTED EXHIBITS, THE LOWER COURT DID NOT ERR IN ALLOWING THEIR TESTIMONY, AND MOTIONS FOR JNOV AND DIRECTED VERDICT WERE CORRECTLY DENIED.

Standards of Review Facts and all legitimate inferences therefrom must be viewed in a light most favorable to the non moving party on review of a denial of a motion for directed verdict and judgment notwithstanding the verdict. Farwell v Keaton (1974), 51 Mich App 585, 215 NW2d 753, rev'd on other grounds (1976) 396 Mich 281, 240 NW2d 217. If reasonable minds could differ, then the question is one for the trier of fact. Dundee v Puerto Rico Marine Management, Inc. (1985) 147 Mich App 254, 383 NW2d 176, app den (1986) 425 Mich 858. The admission of expert opinion testimony will not be reversed on appeal absent an abuse of discretion. Rouch v Enquirer & News (1990), 184 Mich App 19, 457 N.W.2d 74, 17 Media LR 2305, app gr (1991), 437 Mich 1035, 472 N.W.2d 637 and vacated on other grounds (1992), 440 Mich 238, 487 N.W.2d 205, 20 Media L R 2265, reh den (1992), 440 Mich 1209, 488 N.W.2d 736 and cert den (1993), 507 US 967, 122 L. Ed. 2d 774, 113 S Ct 1401, reh den (1993) 507 US 1407, 123 L Ed 2d 507, 113 S Ct 1891. The question of whether expert testimony will assist the trier of fact is addressed to the discretion of the trial court. Slocum v Ford Motor Co. (1981) 111 Mich App 127, 314 NW 2d 546. The qualification of a witness as an expert is a matter for the discretion of the trial court. Jones v Sanilac County Rd. Com. (1983), 128 Mich App 569, 342 N.W.2d 532, app den (1984), 419 Mich 936. The standard for review of witnesses' competence is that of abuse of discretion. Green v Jerome-Duncan Ford, Inc., 195 Mich App 493, 498 (1992). A decision that a trial court makes concerning the admissibility of evidence is also reviewed according to an abuse of discretion standard. Gagnon v Dresser Industries Corp,130 Mich App 452, 463; 344 NW2d 582 (1983), aff'd 424 Mich 166 (1985). Errors in the admission or exclusion of evidence are harmless, and shall not be disturbed on appeal unless "refusal to take this action appears to the court inconsistent with substantial justice." MCR2.613(A) An "abuse of discretion" was defined in Spalding v Spalding, 355 Mich 383, 384-5; 94 NW2d 810 810 (1959)

ARGUMENT: The extensive facts stated in the Introduction and Factual Summary, supra, are hereby incorporated by reference. Dr. Gabriel is a pediatric neurologist who is board certified in both pediatrics and

pediatric neurology as well as author of book chapters and articles on relevant subjects related to brains in pediatric neurology. [7b,10b] These are the exact credentials called for and were identical to, or superior to, those of defense witness Dr. Nigro. Dr. Gatewood is board certified in obstetrics and an assistant professor of Obstetrics at Northeastern Ohio University's College of Medicine. [367b] Each had over 25 years of extensive experience both teaching and treating patients. There is simply no legitimate argument that the court abused its discretion, based upon qualifications, in allowing Dr. Gabriel to testify as to causation or the mechanisms of brain injury by the Pitocin, or to allow Dr. Gatewood to testify as to the standards of care or the presence of a Pitocin overdose, inappropriate Pitocin administration, uterine hyper-stimulation, elevated uterine pressures, or reduced blood and oxygen delivery to the fetus arising therefrom.

As a pediatric neurologist and pediatrician, Dr. Gabriel was an expert in perinatal pediatrics, pediatric neurology and the effects of Pitocin on fetal brain. [207b] Mechanistically, he identified direct head compression in addition to the reduction of blood flow to the fetus and to the fetal brain as causal mechanisms for the injury arising out of the Pitocin effects on the uterus. [207b-208b, lines 9-13] Dr. Gabriel's testimony explaining the reduction of blood flow to the fetus was completely omitted from, and thus misrepresented as non-existent, in appellants' Briefs or Appendices.

The other mechanism for Pitocin-related brain injury referred to"pressure" or "compression" type trauma on the fetal head, which is a universally known consequence of excessive Pitocin. The closed head injury aspect was described by Dr. Gabriel as a "compression injury over the surface of the brain." [206b]

Dr. Gatewood testified extensively at trial about the hyper stimulation with elevated non-relaxing pressures of the uterus caused by inappropriate Pitocin (oxytocin) administration. [167b, 168b, 170b, 172b, 177b] The attorney for Dr. Gennaoui, Mr. Watters, even admitted to the jury in his opening that "if this uterus is hyper-stimulated, if it gets too much Pitocin, what that causes is **hypoxia** and you can tell by looking at the fetal,

what's going on with this baby, you can tell indirectly whether there's anything wrong going on with contractions."

Hence, as was explained in the Counter Statement of Facts, there was much more than a reasonable basis, to prove cause in fact. All that is needed to meet the threshold evidentiary standard when proving factual causation is that the plaintiff "must introduce evidence which affords a *reasonable basis* for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough." Skinner v Square D Company, 445 Mich 153, at 165; 516 N.W.2d 475 citing also Mulholland v DEC Int'l, Mich 395, 416; 443 NW2d 340 (1989); Prosser & Keeton, Torts (5th Ed), § 41, p. 269 [emphasis added]

For a summary disposition motion or directed verdict motion, the evidence must be viewed in the light most favorable to plaintiff! In this case the medical records speak for themselves in any event, but when viewed in the light most favorable to plaintiff, leave no doubt. The legal test regarding the sufficiency of causal proof for directed verdicts or summary judgments is "whether reasonable minds, taking the evidence *in a light most favorable to the non-movant*, could reach different conclusions regarding a material fact." Skinner, at 166, citing accord with Anderson v Liberty Lobby, Inc., 477 U.S. 242; 106 S. Ct. 2505; 91 L.Ed.2d 202 (1986). [emphasis added] It is reasonable to conclude that when a medical record documents Pitocin going into two different IV bags, by two different nurses, that Pitocin went into two different bags by the two different nurses. It is more than reasonable, undeniable in fact, to reach the causation in fact and proximate causal conclusion. The newborn examination documented numerous abnormalities confirming the existence of injury from trauma and hypoxia: tachypnea (Resp. Rate = 64) which continued "unchanged," initially Antonio's skin color was black and then noted to change to clear, there was molding of the head noted in the nursing examination, the newborn hospital photograph revealed obvious edema, facial, forehead or brow type molding pattern, extreme deviation of the eyes to the right, and a "cortical thumb" on the left, which is a sign of right sided brain injury. There was some clinical cause of these changes that arose out of labor. To argue otherwise was specious.

Dr. Michael Nigro, D.O., a defense causation witness, who had a couple of pediatric neurological consultation/evaluation contacts with plaintiff, testified that when he had evaluated the plaintiff, "the etiology was unclear, which meant I wasn't certain of what the cause was" and this was documented in his notes in the 1993 medical records, at his last contact when Antonio was 12 years old. [373b "etiology unclear"] Dr. Nigro, in an earlier consultation medical record, documented a focal non-symmetric neurological finding, and noted that Antonio's "left side" spasticity was "more marked" than his right in his October 29, 1981 consultation when Antonio was 15 months old. [372b] Again this points to how the injury was worse in the right side of the brain. Yet, as a testifying expert witness attempting to defend his client, Dr. Nigro was under pressure to provide an alternative time, and mechanism, for the brain injury, and it was not until testifying live at trial that Dr. Nigro alleged that the condition occurred in the first weeks of life: "probably in the first month of fetal development." [327b, lines 12-13] Recall, Dr. Nelson testified that cerebral palsy is a "lesion" which means injury - not mal-develop ment. Furthermore, the U. of M.'s MRI brain reading [371b] made it clear that the corpus callosum, a white matter structure of crossing fibers, demonstrated loss of fibers ("thinning") - and it had to have formed first to become "thinned" or injured. The corpus callosum undergoes myelination beginning at 3-4 months of gestation[12], which is yet another reason that the "first weeks of life" hypothesis was inconsistent with the facts in evidence as well as common knowledge from human embyology.

Dr. Nigro's opinion at trial was completely contradictory to his own medical record, and also made completely impossible by, inter alia, his own testimony regarding the normal growth of plaintiff's brain during gestation prior to labor and delivery. Microcephaly develops <u>after</u> the brain lesion occurs because the dead portions of the brain don't grow and the head growth slows down enough to cross lower percentiles (2 or 3 standard deviations below the mean) and become abnormally small. This takes time, and in this case, plaintiff

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[12] John H. Menkes, *Textbook of Child Neurology*, 5th Ed., p.278

was not born with microcephaly [330b-331b, lines 22-24] and hence has secondary microcephaly [330b] which generally arises during the end of gestation or in the perinatal period. If the lesion to Antonio's brain had occurred in the first month of gestation as Dr. Nigro had testified, Antonio would have been born with a condition known as "primary microcephaly" [330b-331b, lines 22-24] which arises in the first 7 months of gestation.

In a full paragraph, which plaintiff incorporates by reference herein, the Michigan Court of Appeals' opinion identified additional inconsistencies, if not prevarication, in Dr. Nigro's testimony as to the cause of plaintiff's condition or the timing of plaintiff's lesion. [14a, lines 13 to 28]

All of Dr. Gabriel's testimony was grounded in findings in actual admitted records and exhibits. [202b, 204b, 205b, 206b, 218b (elevated newborn resp rate), 219b-223b (newborn picture findings of bruising and cortical injury), 223b-224b (MRI brain), 228b-229b (pediatrics records), 230b-244b (fetal-uterine monitor recordings "these decelerations to me indicate head compression as well as compromising profusion."), 240b, 85a, 137, 241b (example of hypertonicity in the record), 242b-245b, 96a, 98a, 246b (deceleration to below 30), 247b-250b (Oakwood's counsel asked and was granted the opportunity to voir dire Dr. Gabriel as to his knowledge on a study which he spoke about from the literature) [209b-214b (Mr. Saubier argued that Dr. Gabriel "shouldn't be allowed to testify about this study," alleging lack of qualifications and lack of relevancy of the study - but Saubier didn't raise novelty or challenge any mechanism theory]

The plain reading of the medical record, including the fetal-uterine monitoring recordings, the newborn nursing examination, the four pages referring to Pitocin - three of which place the Pitocin in the LR, were facts in evidence which fully supported plaintiff's case. Gennaoui' et al's brief (p. 8) placed the Pitocin in the D5LR by nurse Quinlan, and Oakwood's Brief (p. 30, fn. 24) admits that the Pitocin was also in the D5W as do nurse Tyra's own note and the testimony at trial. The records upon which plaintiff based his case were not speculation or conjecture. It is therefore beyond argument that taking the recorded evidence, particularly in the light most favorable to the plaintiff, a genuine issue of factual causation was indeed presented which was decided

unanimously by the jury in this case.

This case presented a case of brain injury caused by the uterine effects of Pitocin on the fetus. Notwithstanding this, even if there is more than one theory of causation, for example one of hypoxia-ischemia and one of trauma, caused by Pitocin, and the law allows for more than one theory of causation as long as there is one (1) which is logical and that has a basis in the evidence. Kaminski v Grand Truck Western Railroad Company, 347 Mich 417, 422; 79 NW2d 899, 901 (1956) actually quoted from an Alabama Supreme Court case and addressed the difference between a "conjecture" and a "theory of causation" and also pointed out as follows:

> ...if there is any evidence which points **to any 1 theory of causation**, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence. [emphasis added]

In Kaminski, the court went on to quote a California case at 422, and stated as follows:

> If, however, plaintiff has proven sufficient facts to justify a verdict on one theory, the fact that there may be one or more other seemingly rational explanations of the episode in no manner precludes a recovery or invalidates the verdict. These are mere matters of argument to be presented to the jury.

The Kaminski opinion indicated that a "conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference...if there is evidence which points to any one theory of causation, indicating a logical sequence and effect, then there is a juridical basis for such determination, notwithstanding the existence of other plausible theories with or without support in the evidence." Also cited in Skinner, at 164.

Notwithstanding the facts in evidence substantiating the existence of head compression and closed head injury, established as having taken place during labor through facts in evidence including the review of the fetal-uterine monitor recordings, the newborn examination, the newborn picture and later MRI of the brain and neurological work-up, both Dr. Gabriel [207b-208b, lines 9-13, "fetus gets less blood flow from the placenta producing reduced flow to the fetal brain"] and Dr. Gatewood [54a reduced blood flow, reduced oxygen caused]

clearly testified to the same exact mechanism of Pitocin-induced contractions reducing blood supply and therefore reducing oxygen delivery to the fetus and the fetal brain. Given the fact that Dr. Gabriel testified to the existence of brain injury caused by this lack of blood flow during labor, this theory of causation alone, which is based on the multitude of facts in evidence already cited, supra, therefore precludes appellate challenge under either issue before this Court, and instead, should lead to validation of the verdict under Kaminski. See also Mulhollland, at 415. ("It is enough that the plaintiff establishes a logical sequence of cause and effect, notwithstanding the existence of other theories, although other plausible theories may also have evidentiary support." citing Holloway v General Motors Corp (On rehearing), 403 Mich 614, 623; 271 N.W.2d 777 (1978))

IV. CONCLUSION AND REQUESTED RELIEF

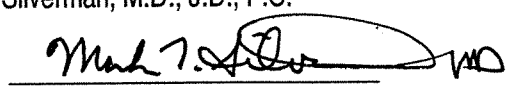
Given the numerous admissions of deviations from the standard of care by defendant Gennaoui and defense witnesses arising out of the records in evidence; given the admitted 6 and1/2 hours of non-stop infusion of Pitocin without ever decreasing the dose; given the four hospital record pages establishing that two nurses each placed Pitocin into the separate IV solutions connected to Ms. Craig; given the continuous fetal-uterine monitoring records which show hours of repeated decelerations culminating in severe decelerations indicative of head compression and compression of the blood supply to the fetus and therefore lack of oxygen supply injurious to the fetal brain, and which also show rising uterine pressure baselines, non-relaxing uterine pressures, coupling of contractions, and abnormally long contractions all indicative of inappropriate Pitocin administration; given the inadequate monitoring; given the newborn nursery's nursing examination which documents abnormal physical signs consistent with having survived hypoxia-ischemia and trauma (head molding, "color of skin black" which later was noted to become "clear", tachypnea, tachycardia, large umbilical cord); given the documented need for an attempted fetal resuscitation with maximum amounts of oxygen given by mask to the mother 51 minutes before delivery, after a very prolonged period of repeated decelerations associated with contractions indicative of repeated intermittent blood supply compression and head compression; given the newborn hospital photograph

which shows a prominent swollen ridge across the newborn's forehead indicative of a facial molding pattern, abnormal extreme deviation of the eyes to the right, left sided cortical thumb neurological finding, and bruising and edema all indicative of trauma; and given the pattern of brain damage revealed on the University of Michigan's MRI of the brain "most pronounced in the postero-frontal and parietal lobes" [22b] consistent with the type of brain injury that occurred during labor, EEG's revealing a right frontal focus; there is no doubt that plaintiff's case at trial arose from and was entirely grounded in facts in evidence.

Given the invalidity of Oakwood's attempt, after dropping the issue pre-trial, to again raise the notion that Pitocin potentially causing a traumatic head injury against mother's anatomy was somehow an issue in dispute; given the fact that the lower court three months before trial granted Oakwood's request to file additional pleadings regarding their Davis-Frye hearing request and specifically asked for a supporting affidavit and Oakwood never raised the issue again and never filed any additional pleadings; given the fact that the request was not in any way related to the "novel scientific evidence" purpose of a Davis-Frye hearing; given the fact that all defense causation witnesses and defendants admitted that Pitocin can and does cause fetal trauma and brain damage; there is no legitimate basis to argue now that the lower court erred or engaged in any harm in not providing a Davis-Frye hearing, given the fact that Gennaoui and Associated Physicians never raised the issue; for all of the reasons stated, Plaintiff-Appellee respectfully requests that this Court deny all aspects of the appellants' appeal and sustain the decisions by the Court of Appeals and the lower court of this great State.

Respectfully Submitted,

Mark L. Silverman, M.D., J.D., P.C.

By: 

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